Supreme Court, U.S.
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No. 05-382

In The

Supreme Court of the United States

RESOURCE TECHNOLOGY CORPORATION,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a state utility commission make its own determination whether a small power producer, already certified as a "qualified facility" ("QF") by the Federal Energy Regulatory Commission ("FERC") under exclusive authority granted by Congress pursuant to the Public Utilities Regulatory Policies Act ("PURPA"), is in compliance with the FERC's QF regulations?

2. Did the Illinois Appellate Court err in holding, in conflict with the opinion of the United States Court of Appeals for the Ninth Circuit in *Independent Energy Producers Assoc., Inc., et al. v. California Public Utilities Commission, et al.*, 36 F.3d 848 (9th Cir. 1994), that a state utility commission is not preempted by federal law from determining whether a federally-certified QF is in compliance with the FERC's QF regulations?

PARTIES TO THE PROCEEDING

Resource Technology Corporation, Petitioner/Plaintiff.

Illinois Commerce Commissi n, Respondent/Defendant.

RULE 29.6 STATEMENT

The Petitioner is a 100% wholly-owned subsidiary of Rumplestiltskin (USA), Inc., a privately-held company. There are no publicly-held companies that hold any stock of the Petitioner. The Petitioner is currently undergoing a reorganization pursuant to Chapter 11 of the federal bankruptcy laws in the United States Bankruptcy Court for the Northern District of Illinois, Case No. 99 B 35434. (R. C00004; App. 112.)

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CITATIONS OF OPINIONS AND ORDERS

All pertinent decisions in this case to date are entitled *Resource Technology Corporation v. Illinois Commerce Commission*. The opinion of the Illinois Appellate Court, First District (App. 1-13) is reported at 354 Ill. App. 3d 895, 822 N.E.2d 50 (1st Dist. 2004). The Illinois Appellate Court's order denying Petitioner's timely filed petition for rehearing (App. 22) is reported at 2005 Ill. App. LEXIS 130 (1st Dist. Feb. 2, 2005). The Illinois Supreme Court's order denying leave to appeal (App. 23) is reported at 215 Ill. 2d 619, 2005 Ill. LEXIS 829 (2005). The opinion of the Illinois circuit court (trial court) (App. 14-21) is unreported.

BASIS FOR JURISDICTION IN THIS COURT

The opinion of the Illinois Appellate Court, First District, was entered on December 28, 2004. (App. 1-13.) The Illinois Appellate Court denied Petitioner's timely filed Petition for Rehearing on February 2, 2005. (App. 22.) On May 25, 2005, the Illinois Supreme Court denied Petitioner's timely filed Petition for Leave to Appeal. (App. 23.) On August 16, 2005, Justice John Paul Stevens extended the time for filing this Petition for Certiorari to and including September 22, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Appendix contains the sections of the Federal Power Act, 16 U.S.C. § 791a, *et seq.*, as amended by the Public Utilities Regulatory Policies Act ("PURPA"), Pub. L. No. 95-617 (1978), that are at issue in the case: 16 U.S.C. § 796 and 16 U.S.C. § 824a-3. (App. 24-39.) Portions of the Energy Policy Act of 2005, Pub. Law No. 109-58, that amend those sections are also reprinted in the Appendix. (App. 39-47.) In addition, the Appendix contains the text of the relevant section of the Illinois Public Utility Act, 220 ILCS 5/8-403.1 (App. 47-55); excerpts of the Federal Energy Regulatory Commission's ("FERC") regulations at issue in the case, 18 C.F.R. § 292, *et seq.* (App. 55-99); and relevant excerpts of the Illinois Commerce Commission's regulations, 83 Ill. Admin. Code § 445, *et seq.* (App. 99-110.)

STATEMENT OF THE CASE

I. Factual Background

A. The Federal Public Utility Regulatory Policies Act (PURPA) and the Federal "Qualified Facility" (QF) Certification.

To promote energy efficiency and reduce American dependence on fossil fuels and foreign energy sources, the United States Congress, in 1978, enacted the Public Utility Regulatory Policies Act ("PURPA"), Pub. L. No. 95-617 (1978). PURPA was an amendment to the Federal Power Act, 16 U.S.C. § 791a, *et seq.* ("FPA"), which grants the Federal Energy Regulatory Commission ("FERC") the exclusive authority to regulate "public utilities" that sell electric power at wholesale in interstate commerce. 16 U.S.C. § 824.

Among other things, PURPA created the federal designation "Qualified Facility," or "QF," for small power production facilities that meet certain operating and efficiency requirements, and delegated to FERC the

responsibility to certify them. 16 U.S.C. § 796(17). QFs generate power by using renewable fuels such as solar, wind, water, and – as is the case with RTC's facility at issue here (the "Pontiac Facility") – landfill methane gas. *Id.* Once FERC has certified a facility as a federal QF, that facility is entitled to certain benefits under PURPA, including the right to sell power generated by the QF to the local utility at the utility's "avoided cost." 16 U.S.C. §§ 824a-3(b)-(d).[1] Avoided costs are defined as "cost to the electric utility of the electric energy, which, but for the purchase from such [QF], such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). (App. 32-33.)

As provided for in PURPA, FERC has promulgated comprehensive regulations governing QFs. These regulations, *inter alia*, describe the operating and efficiency standards that facilities must meet in order to obtain QF certification and maintain federal QF status. 18 C.F.R. §§ 292.201-292.211.[2]

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[1] Signed by President George W. Bush into law on August 5, 2005, the Energy Policy Act, Pub. L. No. 109-58, amends 16 U.S.C. § 824a-3 by, *inter alia*, adding 16 U.S.C. § 824a-3(m). (App. 40-45.) This new subparagraph modifies in certain circumstances the mandatory purchase and sale requirements of QF-generated electric power after the date of enactment. These limited modifications are only operative upon FERC review and determination. Nothing in this amendment affects the FERC's preemptive authority over the QF regulations at issue in this case.

[2] These operating and efficiency regulations, including the fuel usage rates at issue here, are also known as "Subpart B regulations." *See* 18 C.F.R. §§ 292.201-292.211 (App. 55-85); *Independent Energy Producers Assoc., Inc., et al. v. Cal. Pub. Util. Comm'n, et al.*, 36 F.3d 848, 851 (9th Cir. 1994).

B. RTC's Pontiac Facility Obtains a Federal "Qualified Facility" Certification from FERC.

RTC is a small power producer engaged in the business of controlling methane gas pollution generated by landfills, converting the landfill methane gas into electricity, and selling the power to local utilities. (R. C00004; App. 112.) The Pontiac Facility, an RTC landfill-gas-to-electric facility in Pontiac, Illinois, has been certified, in both 1996 and 2002, by the FERC as a federal QF that uses "[l]andfill gas" as its "primary energy source." (R. C00010-16; App. 117-124.) There is no dispute that the federal QF certification for the Pontiac Facility is in full force and effect. (R. C00006; App. 114.)

C. The Illinois Public Utilities Act and the ICC's "Qualified Solid Waste Energy Facility" (QSWEF) Designation.

After the passage of PURPA, the Illinois legislature amended the Illinois Public Utilities Act ("IPUA"), and the Illinois Commerce Commission ("ICC") promulgated regulations consistent with the purposes of FERC's QF regulations. *See generally* 220 ILCS §§ 5/8-403, *et seq.* (App. 47-55); 83 Ill. Admin. Code § 430.10, *et seq.*; 83 Ill. Admin. Code § 445.10, *et seq.* (App. 99-110.) Moreover, to promote the development of renewable energy in Illinois, the legislature also provided an additional statutory incentive to encourage the construction of certain types of federal QFs, including those that, like the Pontiac Facility, use landfill methane gas as the primary fuel source. 220 ILCS § 5/8-403.1. Such facilities are termed "Qualified Solid Waste Energy Facilities," or "QSWEFs." 220 ILCS § 5/8-403.1(b).

The additional statutory incentive enacted by the Illinois legislature to encourage the construction of landfill-methane gas QFs is referred to commonly as the

"Retail Rate Law." 220 ILCS § 5/8-403.1. Under the Retail Rate Law, the local utility is required to enter a ten-year contract with such a facility, and can also be required to pay the "retail rate" for the electricity generated by the federal QF, which is a rate equal to the average cost per kilowatt-hour paid by the unit(s) of local government in which the federal QF is located (the "Retail Rate"). 220 ILCS § 5/8-403.1(c); 83 Ill. Admin. Code § 445.60. Because the Retail Rate may be higher than the local utility's reported avoided cost, the state grants tax credits to the utility company in an amount equal to any difference in the two. 220 ILCS § 5/8-403.1(d); 83 Ill. Admin. Code § 445.70. The State of Illinois is paid back the difference between the avoided cost and the reported Retail Rate after retirement of the debt incurred by the QF to finance construction of the power production facility. 220 ILCS § 5/8-403.1(d); 83 Ill. Admin. Code § 445.70.

To be entitled to the benefits of the Retail Rate Law, a federal QF must also be certified by the ICC as a QSWEF. *See* 83 Ill. Admin. Code § 445.30(a). ICC regulations define a QSWEF disjunctively as:

> a facility that meets the criteria set forth in 18 CFR 292 [the FERC federal QF regulations] . . . and the [Illinois] Local Solid Waste Disposal Act . . . *or* an electric generating facility which uses methane gas generated from landfills and meets such requirements of 18 CFR 292.

83 Ill. Admin. Code § 445.20 (emphasis added).[3] (App. 100.) By ICC regulation, a facility "meets the criteria set forth

[3] As far as demonstrating compliance with Illinois' Local Solid Waste Disposal Act, the facility owner must file with the ICC evidence that an appropriate solid waste management plan has been filed with and approved by the Illinois Environmental Protection Agency. 83 Ill. Admin. Code § 445.30(c). There is no dispute that this was done for the Pontiac Facility. (R. C00023; App. 131.)

in" or the "requirements of" 18 C.F.R. § 292 in either of two ways:

> In demonstrating compliance with 18 CFR 292, the owner(s) or operator of a facility must file with the [ICC] a copy of: 1) the notice filed with [FERC] pursuant to 18 CFR 292.207, or 2) certification as a qualifying facility issued by the [FERC] . . .

83 Ill. Admin. Code § 445.30(b). (App. 101.) Thus, according to its own regulations, compliance with 18 C.F.R. § 292 is established by filing with the ICC a federal QF certification from FERC.

D. RTC's Pontiac Facility Obtains a "QSWEF" Designation from the ICC.

In 1997, the ICC issued an order certifying fifteen (15) RTC facilities, including the Pontiac Facility, as QSWEFs. (R. C00018-30; App. 125-141.) The ICC's order reflects that the ICC took into account as evidence in support of the requested QSWEF certifications the fact that the FERC had designated the facilities as federal QFs and, therefore, the ICC concluded, "RTC has met the requirements of Section 8-403.1(b) of the [IPUA] and finds them to be QSWEFs." (R. C00023; App. 131.)

E. The FERC's Waiver Authority and the Decertification Process.

As previously indicated, FERC regulations identify specific operating and efficiency standards that apply to small power production facilities like RTC's Pontiac Facility, and among these are federal fuel usage rates. 18 C.F.R. §§ 292.204(a)-(b). QFs powered by landfill methane may use fossil fuels for "ignition, startup, testing, [and] flame stabilization"; however, the rate of fossil fuel usage "may not, in the aggregate, exceed 25 percent of the total

energy input of the facility" in each designated twelve-month period. 18 C.F.R. § 292.204(b)(2). (App. 66.)

FERC has the authority to waive operating and efficiency standards for a particular facility. *See* 18 C.F.R. §§ 292.204(a)(3), 292.205(c); 16 U.S.C. § 825h. *See also Kramer Junction Co., et al.*, 61 F.E.R.C. ¶ 61,309 at 62,156 (1992) (FERC has "general authority to waive [FERC] regulations when doing so would be in the public interest"). In the event of non-compliance with federal standards, FERC regulations also detail the procedures for a FERC-ordered QF decertification. 18 C.F.R. § 292.207(d).

F. The ICC Questions Whether the Pontiac Facility Is in Compliance with the FERC's Fuel Usage Rate Regulations.

On July 9, 2002, the ICC Energy Division Staff issued a report ("Staff Report") addressing the fuel usage rate at the Pontiac Facility, specifically the usage rate of fossil fuel (natural gas). (R. C00032-35; App. 142-147.) RTC does not deny it has used fossil fuel at the Pontiac Facility, as allowed by federal regulation, 18 C.F.R. § 292.204(b), and RTC specifically disclosed its usage of fossil fuel to the FERC. (R. C00016; App. 124.).

Nevertheless, the Staff Report questioned the Pontiac Facility's fuel usage rate (R. C00033-34; App. 145-146), citing as the sole basis the fact that "FERC regulations place restrictions on the use of oil, natural gas, and coal by a [QF] to very specific purposes." (R. C00033-34; App. 145.) The Staff Report goes on to refer to FERC regulation 18 C.F.R. § 292.204(b)(2) governing fuel usage rates:

> Deviation from the use of natural gas for the specific purposes set forth in FERC's regulations would result in the facility's non-compliance with FERC's QF requirements. Moreover, in order for a facility to be granted and maintain QSWEF

> status under Illinois law, it must achieve and maintain its status as a QF under federal law and FERC rules. Deviation from the use of natural gas for the specific purposes set forth in FERC's regulations would result in the facility's non-compliance with Section 8-403.1(b) of the [IPUA].

(R. C00034; App. 146.)

Based on the Staff Report, the ICC initiated Proceeding Number 02-0461 ("ICC Proceeding") by Order dated July 10, 2002, to determine whether the Pontiac Facility was in compliance with federal fuel usage regulations and, as a result, whether it should be denied the Retail Rate. (R. C00040-43; App. 149-154.) The Order itself refers to the Staff Report's speculation "that the [Pontiac Facility] is no longer using methane gas generated from landfills as its primary fuel." (R. C00040; App. 150.) The ICC asserts that it "has jurisdiction over the subject matter" of federal fuel usage rates as discussed in the Staff Report. (R. C00042; App. 152.)

II. This Litigation

A. RTC Seeks to Enjoin the ICC Proceeding Based on Federal Preemption Grounds.

RTC filed its Complaint for Declaratory Relief and Injunctive Relief ("Complaint") on October 4, 2002, claiming that the ICC Proceeding is an invasion of FERC's exclusive federal jurisdiction to regulate fuel usage. (R. C00003-43; App. 111-154.) Specifically, RTC pled:

> There exists a genuine dispute between RTC and the ICC over whether the ICC may . . . invade the exclusive jurisdiction of the FERC by reconsidering whether the Pontiac Facility is in compliance with QF regulations promulgated by

> FERC, when the Pontiac Facility is, in fact, currently certified as a QF under the federal PURPA statute pursuant to 18 C.F.R. § 292.207.

Complaint, ¶ 15. (App. 115-116.) RTC sought a declaration that the ICC was without authority to address compliance with the FERC fuel usage rate regulation at the Pontiac Facility or any other aspect of the FERC's certification of the Pontiac Facility as a QF. (R. C00007-8; App. 115-116.) RTC also sought to enjoin that portion of the ICC Proceeding seeking to review RTC's compliance with FERC federal fuel usage rate regulations. (R. C00007-8; App. 115-116.)

On December 23, 2003, the Illinois circuit court, ruling on the ICC's Motion to Dismiss and RTC's Motion for Summary Judgment, dismissed the complaint. (R. C00422-23; App. 14-21.) In its order, the circuit court held that RTC had challenged "only the alleged attempt by the [ICC] to invade the jurisdiction of FERC" and concluded that the ICC Proceeding did not conflict with federal regulations and, thus, could proceed. (R. C00422-23; App. 21.)

B. The Illinois Appellate Court Rules Against RTC on Its Federal Preemption Claim.

RTC timely appealed the circuit court's order to the Illinois Appellate Court, First District. On appeal, RTC argued that the ICC's attempt to review RTC's compliance with federal fuel usage rates was preempted by PURPA and the federal regulations promulgated by the FERC. RTC contended, first, that the FERC had exclusive authority to determine whether a QF was in compliance with federal fuel usage regulations and, in addition, that an attempt by a state commission to make a concurrent determination on that issue was impermissible and preempted by federal law.

On December 28, 2004, the Illinois Appellate Court affirmed the circuit court's dismissal of RTC's Complaint. The Illinois Appellate Court based its opinion on the doctrine of conflict preemption and held:

> [T]he [ICC's] review [of RTC's fuel usage rates] does not stand as an obstacle to the accomplishment and execution of FERC's objectives under PURPA. Indeed, the [ICC's] proposed review furthers the federal objective of ensuring that certified facilities have a primary fuel source which is 75% biomass (*i.e.*, non-fossil-fuel organic matter), waste, renewable resources (*e.g.*, wind, solar or hydropower), geothermal resources, or a combination thereof. *See* 18 C.F.R. § 292.204(b)(1)(I) (2004). RTC has not carried its burden of establishing that the [ICC's] proposed review is preempted by federal law.

(App. 9.)

RTC's petition to the Illinois Appellate Court for rehearing was denied on February 2, 2005. (App. 22.) RTC timely filed a Petition for Leave to Appeal to the Illinois Supreme Court (App. 23), which was denied in an exercise of its discretion on May 25, 2005. RTC now seeks a writ of certiorari to the Illinois Appellate Court, the highest Illinois Court in which a decision could be had.

REASONS FOR GRANTING THE WRIT

To promote America's energy self-sufficiency and decrease dependence on foreign fossil fuels, the United States Congress has sought to encourage small power producers, like RTC, to enter the energy market and produce electricity from renewable energy sources. Congress has specifically delegated to the FERC the task of determining whether such small power producers meet and maintain federal standards in order to ensure those national policy goals are met. However, interference from

Illinois' state utility commission into that determinative process threatens to create uncertainty and ambiguity in the federal regulatory scheme, increase compliance costs, and undermine the drive to greater energy self-sufficiency in America. Such state intrusion into the FERC's exclusive purview is expressly preempted, according to the United States Court of Appeals for the Ninth Circuit, and, if allowed to stand, the Illinois Appellate Court's erroneous decision below on the issue of federal preemption would undermine both the authority of FERC and the important goals of PURPA.

I. This Case Presents an Important Question Impacting the Federal Policy of Energy Self-sufficiency in the United States.

A. Confronting the Nation's Energy Supply Problems, Congress Enacted PURPA to Encourage Small Power Producers That Use Renewable Energy Sources to Enter the Power Market.

During the 1970s, the United States faced an energy crisis, due in large part to its dependence on foreign fossil fuels. At the time, approximately one-third of all electricity in America was generated through oil or natural gas. *See Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 745, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982). Electric utilities were faced with increasing costs and decreasing efficiencies, which in turn adversely affected consumers and the American economy. *Id.* at 745-46. Confronted with this crisis, Congress enacted PURPA in order to promote the development of alternative energy sources, including cogeneration and small power production facilities, to lessen dependence on foreign oil, to avoid supply shortages in natural gas that had been experienced in 1977, and to control consumer costs. *See Federal Energy Regulatory Comm'n v. Miss.*, 456 U.S. at 745-46; *Independent Energy*

Producers Ass'n, Inc. v. California Public Utilities Comm'n, 36 F.3d 848, 850 (9th Cir. 1994).

In order to help achieve the goal of national energy self-sufficiency, PURPA created the federal QF designation for small power production facilities that use renewable fuels (such as solar, water, and landfill methane) and meet certain operating and efficiency requirements, and delegated to FERC the responsibility to certify a facility as a federal QF. 16 U.S.C. § 796(17). Once certified by the FERC, the QF is entitled to sell the power it generates to the local utility at the utility's "avoided cost." 16 U.S.C. §§ 824a-3(b)-(d). This avoided cost can help the small power producer defray the high costs associated with energy generation and novel renewable technologies.

Over the years since PURPA was enacted, the use of renewable energy sources to generate power in America has increased, and PURPA is considered a prime stimulus of that growth. *See* National Renewable Energy Laboratory, *Profiles in Renewable Energy: Case Studies of Successful Utility-Sector Projects*, at 2 (1993) *available at* http://www.nrel.gov/documents/profiles.html. In addition, QFs under PURPA have generated additional capacity to supplement the nation's overall supply of electricity. *See* Energy Information Administration, U.S. Dept. of Energy, *Renewable Energy 2000: Issues and Trends*, at 9-10 (Feb. 2001), *available at* http://www.eia.doe.gov/cneaf/solar.renewables/rea_issues/rea_issues_sum.html. Nonetheless, the use of fossil fuel in America remains at high levels. In 2003, natural gas and oil were used to generate approximately 20% of the nation's electricity. *See* Energy Information Administration, U.S. Dept. of Energy, *Energy INFOcard* (June 30, 2005), *available at* http://www.eia.doe.gov/neic/brochure/infocard01.htm. While this figure marks a decline from the levels in the late 1970s, the percentage of natural gas and oil still represents a considerable amount of the total energy sources used for electricity

generation. Meanwhile, only around 10% of all electricity is generated from renewable energy sources. *Id.* Thus, while progress has been made in diversifying America's fuel base for power generation, and thereby decreasing dependence on fossil fuels and foreign energy sources, the country still has significant exposure to supply constraints.

This risk Americans face has been particularly palpable over the past few years. As oil prices have surged from $25 per barrel in 2003 to over $60 in 2005, some analysts have expressed a long-term concern with the ability of supplies to meet increasing global demand. *See* Magnus, George, *The World Is Heading for a Shock Over the High Price of Oil*, Financial Times, Aug. 16, 2005, at 15. Federal Reserve Chairman Alan Greenspan has cautioned markets about the supply shortages and high prices of natural gas, problems that are not apt to improve anytime soon, and has repeated calls for greater importation of liquified natural gas. CBS/Associated Press, *Natural Gas Crisis Looming?* CBSNews.com, July 10, 2003, *available at* http://www.cbsnews.com/stories/2003/07/10/national/main562557.shtml. Primarily because of the growth in demand for electricity generation and industrial applications, the U.S. Department of Energy forecasts greater dependence on natural gas, including imports of liquified natural gas. *See* Energy Information Administration, U.S. Dept. of Energy, *Energy Plug: Annual Energy Outlook 2004* (Jan. 26, 2004), *available at* http://www.eia.doe.gov/emeu/plugs/plaeo04.html.

That continued dependency on foreign fossil fuels places the United States' energy market, and the economy as a whole, in a precarious position, and the recent destruction wrought by Hurricane Katrina demonstrated just how susceptible America is to fuel supply shortages and price shocks. The Gulf of Mexico produces approximately 25% of the natural gas used in the United States and is home to one of the few ports that can accept imports of liquefied natural gas. *See* Manor, Robert, *Peoples Warns of Heating Bill*

Jump, Chicago Tribune, Sept. 14, 2005, at C1. After Katrina, Energy Secretary Samuel Bodman expressed "great concern" about natural gas shortages this upcoming winter, as the hurricane caused significant supply and pricing problems. *Id.* This single, albeit historic, natural disaster has exposed America's energy and economic vulnerabilities. Thirty years later, the goals of PURPA are still critically important to the economy and security of the United States, as the country finds itself deficient in the national effort to develop new energy sources.

B. Redundant and Possibly Conflicting Layers of Regulation Will Discourage Entry of Small Power Producers Into the Power Market at a Critical Point in Time.

To help facilitate the aims of PURPA, FERC has given a specific and distinct regulatory role to the states, but one that does not conflict with or undermine the FERC's superior authority. Specifically, the states have a responsibility to oversee contracts between QFs and utilities, while the FERC has the sole authority to make determinations regarding a facility's possession of the characteristics entitling it to QF status. *Independent Energy*, 36 F.3d at 856.

Further, pursuing the aims of PURPA, a vast number of states have legislated financial incentives or mandates to promote renewable energy. *See* Interstate Renewable Energy Council, Database of State Incentives for Renewable Energy, *available at* http://www.dsireusa.org (last updated Sept. 19, 2005); Energy Information Administration, U.S. Dept. of Energy, *Renewable Energy Trends 2004*, at 5 (Aug. 25, 2005), *available at* http://www.eia.doe.gov/cneaf/solar.renewables/page/trends/rentrends04.html. As discussed above, Illinois, for example, uses the Retail Rate Law to encourage the development of those QFs that use methane derived from landfills as a source of

renewable energy (known in Illinois as "QSWEFs"). This state designation does not *per se* pose a conflict with federal law as it merely incentivizes a particular type of FERC-certified QF. *See CGE Fulton, LLC*, 70 FERC ¶ 61,290 at 61,844 (1995) (QSWEFs are "a category of QFs"). However, where the state goes so far as to determine compliance by a FERC-certified QF with the FERC's own regulations, it not only conflicts with the FERC's authority, but, in doing so, it forms another layer of regulation that will complicate and increase the cost of regulatory compliance, generate potentially conflicting determinations from separate authorities, and, in turn, discourage market participation. As such, the ICC Proceeding and the Illinois Appellate Court's decision in this case will work to undermine the goals of PURPA.

Illinois' QSWEF designation is based on QF certification – it is a *sine qua non* of the Illinois state benefit of the Retail Rate. *See* 83 Ill. Admin. Code § 445.30(b). As explained by the ICC's own Staff Report, if a small power producer does not "maintain" its federal QF status (which the Pontiac Facility has at all times maintained), it will consequently lose its right to the state Retail Rate benefit:

> Deviation from the use of natural gas for the specific purposes set forth in FERC's regulations would result in the facility's non-compliance with FERC's QF requirements. Moreover, in order for a facility to be granted and maintain QSWEF status under Illinois law, it must achieve and maintain its status as a QF under federal law and FERC rules. Deviation from the use of natural gas for the specific purposes set forth in FERC's regulations would result in the facility's non-compliance with Section 8-403.1(b) of the [IPUA].

(R. C00034; App. 146.)

However, only the FERC is permitted to make the determination as to a QF's compliance status. A state may inquire into whether a QF is in compliance with FERC regulations, but

> if a state or a utility determines that a QF is no longer in compliance with federal efficiency standards, then the proper remedy is either to petition the [FERC] to decertify the QF or to seek a declaratory order that the facility is no longer a QF.

Independent Energy Producers, 36 F.3d at 859. Thus, if the ICC believes that RTC's Pontiac Facility is no longer in compliance with FERC fuel usage rate regulations, it must follow the decertification procedure set out by the FERC; it should not, and cannot properly, take the matter into its own hands.

There are sound public policy reasons why a single, federal determination on the issue of QF status is needed. As articulated in the *Independent Energy* case:

> [T]o permit states or utilities to challenge compliance of QFs outside of the procedures established by the [FERC] could result in determinations that are inconsistent with this federal scheme and would, in effect, afford certification by the [FERC] little or no deference.

36 F.3d at 855. The Ninth Circuit further explained:

> As a practical matter, the need for uniform federal authority over the determination of QF status is also apparent. The determination of QF status is not a purely ministerial act based on the application of standard formulas. Instead, such a determination requires interpretation based on changing policy and technical concerns. The regulations provide detailed formulas under which status determinations are made, and the

> proper interpretation of these formulas can change based on the [FERC's] changing policy and technical concerns.

Id. at 854 n.11.

Moreover, the FERC may waive compliance with its fuel usage rate regulations for a particular QF, thus allowing an otherwise non-compliant facility to maintain its QF status. For instance, in *Kramer Junction Co., et al.*, 61 F.E.R.C. ¶ 61,309 (1992), a QF that used novel solar technology sought a temporary waiver from the FERC's 25% fossil fuel limitation because climatic conditions reduced its generating ability and affected the producer's financial condition. Pursuant to its authority to waive its regulations when in the public interest (*Id.* at 62,156 (citing 16 U.S.C. § 825h)), the FERC granted the QF a waiver and concluded its decision was consistent with "the PURPA goal of encouraging qualifying facilities." *Id.* at 62,160. *See also Daggett Leasing Corp., et al.*, 64 F.E.R.C. ¶ 61,148 (1993) (same).

Using policy and technical considerations, the FERC is free to make its own unique determinations of compliance with and waiver from QF regulations when reviewing a particular small power producer. As such, a state utility commission could not possibly divine the FERC's stance as to whether a particular facility should be allowed to maintain its federal QF certification because a QF is, by definition, what the FERC says it is. The ICC here is proposing to make its own determination, in essence, whether the FERC would deem the Pontiac Facility in compliance with QF regulations, undermining the goals of PURPA in the process. If, in the context of the ICC Proceeding, the ICC determines that the Pontiac Facility is not in compliance with federal fuel usage rate regulations, the ICC and the FERC will contemporaneously hold inconsistent determinations as to the Pontiac Facility's compliance with the FERC's own regulations. To wit, an

ICC determination that the Pontiac Facility is not in compliance with *federal* fuel usage rate regulations will stand in direct opposition to an existing federal determination that the facility *is* in compliance, as reflected in the Pontiac Facility's valid and extant FERC QF certification.

This duplicative regulatory scheme would constitute no small burden for small power producers. QFs that are in compliance with federal operating and efficiency standards pursuant to the FERC's interpretation of its own regulations may suddenly find themselves out of compliance under the state's interpretation of those same standards and, further, unable or uncertain as to how to prove conclusively their QF status. This disincentive effect would be compounded if other states are each allowed to make determinations that conflict with FERC's own assessments, putting small power producers under the bailiwick of multiple regulatory authorities on the same issue, magnifying the uncertainty and costs of compliance, and discouraging prospective QF entry into the power market.

A facility cannot reasonably serve the dictates of two (or more) authorities on the same issue. As indicated above, a uniform federal authority is needed to avoid potentially inconsistent and illogical results, to create certainty and predictability in the regulatory process, and to moderate the cost of regulatory compliance. If FERC's supremacy is properly recognized, the incentives established by PURPA and the FERC will work as designed to encourage more market participation and to further the national policy of energy self-sufficiency. If, on the other hand, the Illinois Appellate Court ruling is allowed to stand, the disincentives of duplicative, ambiguous, and expensive regulatory procedures will undermine that important national goal.

II. This Case Presents a Direct Conflict Between the United States Court of Appeals for the Ninth Circuit and a State Appellate Court As to Whether the FERC Has Exclusive Jurisdiction Over Determinations of Compliance with Federal Fuel Usage Rate Regulations and, Thus, Whether a State or an FERC Determination on Such Compliance Is Controlling.

The Ninth Circuit's opinion in the *Independent Energy* case cited above directly conflicts with the Illinois Appellate Court's decision in the instant case, and because the two conflicting opinions raise an important question that has an impact on national energy policy, the decisions should be harmonized to provide clear guidance to QFs and other interested parties.

In *Independent Energy*, the California Public Utility Commission ("CPUC") was attempting to implement an order that authorized utilities to monitor compliance with federal operating and efficiency standards by the QFs with which they had contracts. If a utility determined that a QF was not in compliance with those federal standards, it was authorized to substitute a lower rate for the avoided cost rate. *Independent Energy*, 36 F.3d at 852.

The Ninth Circuit, in ruling that the CPUC proposal was preempted, held that the FERC's "regulations carry out the statutory regime reposing in the [FERC] exclusive authority to make QF status determinations" and that "[n]owhere do these regulations contemplate a role for the state in setting QF standards or determining QF status." *Id.* at 854.

The Illinois Appellate Court's decision below flatly conflicts with the Ninth Circuit's holding. Concluding that the ICC Proceeding is not preempted by federal law, the Illinois Appellate Court stated that the ICC's "proposed review furthers the federal objective of ensuring that" QFs

are in compliance with the FERC's regulations regarding operating and efficiency standards. 354 Ill. App. 3d at 902, 822 N.E.2d at 56. (App. 9.) However, according to the Ninth Circuit, the federal regulations do not contemplate a role for the state in making such determinations. *Independent Energy*, 36 F.3d at 854. As discussed previously, the FERC's exclusive role exists to ensure that one regulatory agency makes a uniform decision and avoids the need for, and confusion over, multiple determinations. Where a state or utility believes that an FERC-certified QF is no longer in compliance with federal regulations, then the state or utility can obtain a determination from the "exclusive authority to make QF status determinations" – the FERC – pursuant to the FERC's own QF decertification procedure. *Independent Energy*, 36 F.3d at 854.

Without ever directly addressing the facts of the *Independent Energy* case, the Illinois Appellate Court raised a notable point of argument, which the ICC also used below to suggest a distinction between the instant case and the Ninth Circuit opinion:

> In the event the Pontiac Facility's QSWEF status is revoked under the Retail Rate Law and it is no longer eligible to receive a state-subsidized "retail rate," this determination would not interfere with the facility's designation as a QF under PURPA and would not affect the facility's right to continue receiving federal benefits in the form of "avoided cost rates."

(App. 8.) However, this argument does little to distinguish the instant case from *Independent Energy*.

In the *Independent Energy* case, like here, the state was not proposing to revoke or interfere with a facility's actual QF certification. Rather, what the Ninth Circuit found critically problematic was the state's attempt to invade the FERC's exclusive purview:

> The CPUC program usurps the [FERC's] authority by authorizing the Utilities to determine whether a QF is in compliance with federal efficiency standards.

Independent Energy, 36 F.3d at 854. Thus, in both this case and *Independent Energy*, the fact that a state proposed to determine whether a QF is in compliance with federal efficiency standards "usurp[ed]" FERC procedures and was sufficient for a finding of preemption.

In addition to that dispositive fact, both cases present the impermissible possibility that a state-level review of a QF's compliance with FERC regulations will deprive the QF of a financial benefit that flows from its very status as a QF. In *Independent Energy*, the CPUC was proposing to delegate to a utility, wholly outside the FERC, the authority to determine whether a FERC-certified QF was in compliance with federal operating and efficiency standards. In the event of an adverse determination, the QF would then not be entitled to a statutorily-created financial benefit – payment of the "avoided cost" rate – a benefit premised on the facility's status as a QF.

Similarly, the ICC is proposing here a procedure, wholly outside the FERC, to determine whether the Pontiac Facility is in compliance with FERC operating and efficiency standards. In the event of an adverse determination, RTC would no longer be entitled to a statutorily-created financial benefit – payment of the "Retail Rate" – a benefit premised on the Pontiac Facility's status as a QF. While the benefit of the "avoided cost" rate at issue in *Independent Energy* flowed directly from PURPA, the Retail Rate at issue here is similarly available pursuant to a state law enacted to further the goals of PURPA. In both situations, a QF is losing the right to a financial benefit, one derived from its very status as a FERC-certified QF, based solely on a state-level determination of compliance with federal regulations – a determination which the state

is plainly not permitted to make, regardless of the consequences.

If the Illinois Appellate Court decision obtains in spite of the *Independent Energy* case, then conflicting precedents will exist, and QFs like RTC's Pontiac Facility, as well as prospective QFs, will be uncertain as to how to conduct and assess their own regulatory compliance. Small power producers could well be confronted with inconsistent regulatory determinations and would be unable to know for certain which determination is controlling on the issue of compliance with federal operating and efficiency standards: That of the FERC or the state utility commission. Further, confusion will abound on whether compliance with FERC regulations should be resolved through the FERC's decertification procedure or through a state utility commission proceeding. Only a resolution of the conflict between these cases will help small power producers and other QFs safely and sensibly navigate through this regulatory terrain.

III. The Decision Below Is Incorrect, As the Illinois Appellate Court Misapplied and Misapprehended Federal Preemption Principles.

Central to RTC's appeal is the issue of federal preemption of the ICC Proceeding as it relates to a determination of compliance with federal fuel usage rate regulations. The Supremacy Clause of the Constitution recognizes Congress' power to preempt state law. U.S. Const. art. VI, cl. 2. Preemption is not limited to congressional action; it may result from a federal agency acting within the scope of its congressional mandate. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Further, federal preemption applies not only to a particular state statute, but also may "deny state authority to act in a way that would undermine the purpose of federal law." *Appalachian Power Co. v. Pub. Serv. Comm'n of W.*

Va., 812 F.2d 898, 904 (4th Cir. 1987) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Preemption may be found under various circumstances – whether explicitly directed by federal law or implicitly contained in a law's structure and purpose. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983). The methods of analyzing these circumstances are often categorized into the following doctrines: express preemption, field preemption, and conflict preemption. *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

In its opinion, the Illinois Appellate Court failed to analyze this issue under the relevant doctrines of express and field preemption, and instead focused its analysis solely on conflict preemption principles. In so doing, the appellate court ignored RTC's principal federal preemption argument. Further, in its conflict preemption analysis, the appellate court misapprehended the conflicts implicated in this case.

A. The Court Below Failed to Apply the Doctrines of Express Preemption and Field Preemption to Its Analysis.

Express preemption occurs where Congress, in enacting a federal statute, expresses a clear intent to preempt state law. *English v. General Elec. Co.*, 496 U.S. at 78-79. In the absence of explicit Congressional language, field preemption may apply where a state "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79. This intent "may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touches a field in which the federal interest is so dominant that the federal system will be assumed to

preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Finally, conflict preemption applies where state action actually conflicts with federal law, such as where a private party cannot possibly comply with both state and federal requirements, or where a state law or regulation presents an obstacle to achieving a federal goal or objective. *See English*, 496 U.S. at 79. These categories are not rigidly distinct. *See English*, 496 U.S. at 79 n.5. For instance, "a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *Id.*

At all stages of this litigation, RTC's preemption argument has been based on the principle that where a federal agency, such as the FERC, has been granted exclusive jurisdiction by Congress, a state agency does not have the authority to invade and undermine that jurisdiction, and its overreaching actions are preempted. Complaint, ¶ 15. *See, e.g., Independent Energy*, 36 F.3d at 853-54; *Freehold Cogeneration Assoc., L.P. v. Board of Reg. Comm'rs of the State of N.J.*, 44 F.3d 1178, 1194 (3rd Cir. 1995); *Appalachian Power Co.*, 812 F.2d at 904-05. Nevertheless, the Illinois Appellate Court based its Opinion solely and narrowly on the doctrine of "conflict preemption," overlooking express and field preemption analyses. (App. 8.)

1. The Express Preemption Doctrine Applies in This Case.

The express preemption analysis that applies to the specific federal law and regulations at issue here was set out in *Independent Energy*, 36 F.3d at 853-54. In that Ninth Circuit case, the California Public Utility Commission was attempting to implement an order authorizing utilities to monitor compliance with federal operating and efficiency standards of QFs with which they had contracts.

Id. at 852. If a utility determined that a QF was not in compliance with those federal standards, it was authorized to substitute a lower rate for the avoided cost rate. *Id.*

In analyzing the relevant law, the Ninth Circuit determined:

> The structure of PURPA and the [FERC's] regulations, reflect Congress's *express* intent that the [FERC] exercise exclusive authority over QF status determinations.

Independent Energy, 36 F.3d at 853-54 (emphasis added). For support, the court cited to the explicit language of the relevant federal regulations:

> Section 201 of PURPA provides that a QF is a cogeneration facility that *"the Commission* determines, by rule, meets such requirements . . . as *the Commission* may, by rule, prescribe." 16 U.S.C. § 796(18)(B)(i) . . .

Independent Energy, 36 F.3d at 854 (emphasis in original).[4] Further, the court concluded:

> The Commission's regulations carry out the statutory regime reposing in the [FERC] *exclusive* authority to make QF status determinations . . . *Nowhere do these regulations contemplate a role*

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[4] In the *Independent Energy* case, the QFs at issue were cogeneration facilities, as opposed to a small power producer like RTC; however, the regulations defining the FERC's authority over both types of QFs are in all pertinent respects precisely the same: a QF may be a small power production facility "that the [FERC] determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the [FERC] may, by rule, prescribe . . ." *See* 16 U.S.C. § 796(17)(C) (as amended). (App. 45.) The operative language is identical and, thus, the interpretation as to Congress' express intent should be no different.

> *for the state in setting QF standards or determining QF status.*

Id. (emphasis added). As articulated by the Ninth Circuit, the express intent of Congress was to grant the FERC exclusive authority over QF status determinations. Thus, in *Independent Energy*, a state utility commission's action was deemed preempted where it delegated to utilities the authority to make determinations about a QF's compliance with federal operating and efficiency standards. *Id.* at 859.

Similarly, in the instant case, the Illinois state utility commission's attempt to make a determination as to the status of a QF's compliance with federal operating and efficiency standards is expressly preempted. However, because the Illinois Appellate Court never addressed this analysis, it arrived at an erroneous conclusion on the issue of preemption.

2. The Field Preemption Doctrine Also Applies in This Case.

Even were it not expressly preempted, the ICC Proceeding would still be preempted under field preemption principles.[5] Federal law and regulations supercede state law and action, regardless of any actual conflict or expressed intent, where the scheme of federal regulation is sufficiently comprehensive so that a reasonable inference arises that Congress has left no room for supplementary regulation, or where the federal interest is so dominant that the federal system will be assumed to preclude

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[5] As indicated above, because the reasons behind the preemption doctrines can be coextensive, the various doctrines may simultaneously apply to a single situation. *See English*, 496 U.S. at 79 n.5.

enforcement of state laws on the same subject. *See Hillsborough County, Florida v. Automated Medical Labs, Inc.*, 471 U.S. 707, 713 (1985). When the federal government completely occupies a given field or an identifiable portion of it, the test of preemption is whether "the matter on which the state asserts the right to act is *in any way* regulated by the federal government." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13 (1983) (citations omitted) (emphasis added).

As explained in *Independent Energy*, the FERC regulations comprehensively occupy the field of operating and efficiency standards for QFs: "Nowhere do these regulations contemplate a role for the state in setting QF standards or determining QF status." 36 F.3d at 854. A facility's status as a QF hinges on its compliance with these federally-mandated QF standards, including fuel usage rate regulations. Therefore, an assessment of a QF's compliance with such federal regulations by a state utility commission necessarily yields a determination of its federal QF status.

The ICC advanced the argument below, and the Appellate Court agreed, that RTC's QF certification for the Pontiac Facility was not technically being put at risk by the ICC Proceeding, nor was RTC at risk of being deprived of the "avoided cost" rate. But this is an argument of form over substance. If the ICC were to determine that the Pontiac Facility is not in compliance with federal regulations – contrary to the existing federal QF certification – the ICC will be depriving RTC from a benefit that flows from its QF status, and if the ICC were to hold that RTC is not in compliance with federal fuel use regulations, it is unclear whether that would constitute a determination that would be binding on RTC in any future proceeding before the FERC. Because of such ambiguity and the serious consequences attendant thereto, the state simply

has no role in deciding whether a QF is in compliance with FERC regulations – that is the sole province of the FERC.

As evidenced in the Staff Report that prompted the ICC Proceeding, it is undisputed that the ICC seeks to make a determination of whether the Pontiac Facility is in compliance with *federal* fuel usage rate regulations – a field exclusively within the FERC's authority. (R. C00034; App. 146.) As such, the ICC is asserting a right to act on a matter that is "*in any way* regulated by the federal government." *Pacific Gas & Electric*, 461 U.S. at 212-13 (emphasis added). Because the ICC Proceeding seeks to address compliance with fuel usage rates mandated by the FERC, it is preempted. The Illinois Appellate Court failed to apply the field preemption analysis, and, as such, the decision below was incomplete and erroneous.

B. The Court Below Misapprehended the Conflict Preemption Doctrine in This Case.

Conflict preemption arises when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment of the full objectives of Congress. *Hillsborough*, 471 U.S. at 713. Here, conflict preemption applies for the same reasons that the express and field preemption doctrines apply, as explained above. In addition, conflict preemption principles are implicated because of a procedural tension between the ICC Proceeding and the FERC's own compliance review and decertification procedures.

In its analysis of conflict preemption in this case, the Illinois Appellate Court focused solely on the possible outcomes of the ICC Proceeding. (App. 8.) This focus was misplaced, as the Court misapprehended the procedural conflict that will result from dual state and federal regulatory determinations. Quite simply, the ICC is holding a

proceeding that directly conflicts with the FERC's own mandated procedures regarding compliance review and decertification:

> [I]f a state or a utility determines that a QF is no longer in compliance with federal efficiency standards, then the proper remedy is either to petition the [FERC] to decertify the QF or to seek a declaratory order that the facility is no longer a QF.

Independent Energy, 36 F.3d at 859. *See also* 18 C.F.R. § 292.207(d).

If the ICC believes that the Pontiac Facility is no longer in compliance with FERC fuel usage rate regulations, then it must follow the QF decertification procedure set out by the FERC; it should not, and cannot properly, take the matter into its own hands:

> [T]o permit states or utilities to challenge compliance of QFs outside of the procedures established by the [FERC] could result in determinations that are inconsistent with this federal scheme and would, in effect, afford certification by the [FERC] little or no deference.

Independent Energy, 36 F.3d at 855. Notwithstanding the federally mandated decertification procedure, the ICC has initiated its own proceeding to make a determination which only the FERC is allowed to make. The ICC Proceeding presents a direct conflict with the FERC compliance review and decertification procedures and, therefore, is preempted. However, the Illinois Appellate Court misapprehended the conflict with federal objectives that was at issue here, and, thus, the decision below was reached in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RESOURCE TECHNOLOGY CORPORATION, Plaintiff-Appellant, v. ILLINOIS COMMERCE COMMISSION, Defendant-Appellee.

No. 1-04-0188

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SECOND DIVISION

354 Ill. App. 3d 895; 822 N.E.2d 50; 2004 Ill. App. LEXIS 1547; 290 Ill. Dec. 768

December 28, 2004, Decided

COUNSEL: FOR APPELLANT: C. Philip Curley, Alan R. Dolinko, and Carl Bergetz of ROBINSON, CURLEY & CLAYTON, P.C., Chicago, Illinois.

FOR APPELLEE: John P. Kelliher, Special Assistant Attorney General, Chicago, Illinois.

JUDGES: JUSTICE HALL delivered the opinion of the court. BURKE, P.J., and GARCIA, J., concur.

OPINION BY: HALL

OPINION:

JUSTICE HALL delivered the opinion of the court:

Resource Technology Corporation (RTC) is a Delaware corporation that presently owns and operates approximately 15 electric generating facilities in Illinois, including the facility located at 14732 East 2100 North Road, Pontiac, Illinois (Pontiac Facility). All of the electric generating facilities, including the Pontiac Facility, are primarily fueled by landfill-generated methane gas.

RTC appeals from the judgment of the trial court granting the Illinois Commerce Commission's (Commission) motion to dismiss RTC's complaint for declaratory

and injunctive relief and denying RTC's motion for summary judgment on its request for the declaratory ruling.

On appeal, RTC contends that: (1) the Commission's proposed review of the Pontiac Facility's status as a "qualified solid waste energy facility" (QSWEF) pursuant to section 8-403.1(b) of the Illinois Public Utilities Act, commonly referred to as the "Retail Rate Law" (220 ILCS 5/8-403.1(b) (West 2000)), is preempted by the Public Utility Regulatory Policies Act of 1978 (PURPA) (16 U.S.C. § 824a-3 (2000)); (2) a facility's status as a QSWEF under state law is automatically established when the facility files a Federal Energy Regulatory Commission (FERC) certification as a "qualified facility" (QF) pursuant to PURPA or a notice of application for such certification; and (3) the trial court erred by relying on the statutory phrase "possesses characteristics," contained in section 8-403.1(b) of the Retail Rate Law, in finding that the Commission possessed the authority to reevaluate the Pontiac Facility's fuel usage rate as it related to the facility's status as a QSWEF. For the reasons that follow, we affirm.

BACKGROUND

On July 1, 1996, all of RTC's then proposed facilities, including the Pontiac Facility, were certified as a QF pursuant to PURPA.[1]

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[1] In response to the nationwide energy crisis, Congress enacted PURPA in 1978 to encourage states to develop alternative energy sources, such as cogeneration and small power production facilities, in an effort to reduce this country's dependence on traditional fossil fuels. *See Federal Energy Regulatory Com'n v. Mississippi*, 456 U.S. 742, 72 L. Ed.2d 532, 102 S. Ct. 2126 (1982); *New York v. United States*, 505 U.S. 144, 161, 120 L. Ed.2d 120, 141, 112 S. Ct. 2408, 2420 (1992); *Independent Energy*

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Thereafter, in early 1997, RTC filed verified petitions with the Commission requesting that the proposed facilities, including the Pontiac Facility, be certified under state law as QSWEFs pursuant to section 8-403.1(b) of the

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Producers Ass'n, Inc. v. California Public Utilities Comm'n, 36 F.3d 848, 850 (9th Cir.1994).

A "cogeneration facility" is a facility that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. § 796(18)(A) (2000). A "small power production facility" is a facility that produces electric power from biomass, waste, renewable resources such as wind, water or solar energy, or geothermal resources, and has a production capacity of not more than 80 megawatts. 16 U.S.C. § 796(17)(A) (2000). A cogeneration or small power production facility will be certified as a QF if it satisfies the requirements regarding ownership, size, fuel usage, efficiency, and reliability under PURPA. 16 U.S.C. §§ 796(17)(C), (18)(B) (2000).

The Federal Energy Regulatory Commission (FERC) exercises exclusive authority over QF status determinations under PURPA. *See Independent Energy Producers Ass'n*, 36 F.3d at 853-54. In an effort to encourage development of alternative energy sources and to overcome the reluctance of traditional utilities to buy from and sell to these alternative producers, Congress granted QFs certain benefits. Under PURPA, QFs are exempt from certain regulatory controls and are assured a market by being given the right to interconnect with local public utilities and to receive favorable rates, prescribed by FERC, up to the full "avoided cost" of the utility. *See American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 404-06, 76 L. Ed.2d 22, 27-29, 103 S. Ct. 1921, 1923-25 (1983).

Section 210(a) of PURPA (16 U.S.C. § 824a-3(a) (2000)) directs FERC to promulgate rules requiring electric utilities such as Commonwealth Edison Company to offer to sell and purchase electric energy to and from QFs. Pursuant to section 210(a) of PURPA, a utility in need of energy or capacity must offer to purchase from a cogenerator or small power producer that is a QF. In turn, the QF may demand a price that is equal to, but not greater than, the utility's full "avoided cost." *See* 16 U.S.C. § 824a-3(b) (2000); 18 C.F.R. § 292.304(b)(2) (2000). The "avoided cost" is the incremental cost the utility would have incurred by either generating the power itself or purchasing it from an alternative source other than a QF. 18 C.F.R. § 292.101(b)(6) (2000).

Retail Rate Law (220 ILCS 5/8-403.1(b) (West 2000)).[2] *See Resource Technology Corp.*, Ill. Comm. Comm'n Nos. 97-0031 to 97-0045 (cons.) (October 8, 1997). On October 8, 1997, the Commission determined that each of the proposed facilities met the requirements of a QSWEF under the Retail Rate Law, thereby entitling the facilities to receive a "retail rate." *See Resource Technology Corp. v. Commonwealth Edison Co.*, 343 Ill. App.3d 36, 38-40, 795 N.E.2d 936, 277 Ill. Dec. 268 (2003).

On July 10, 2002, the Commission issued a citation order to initiate proceedings against RTC to determine whether the Pontiac Facility continued to meet the criteria necessary to remain a QSWEF. *Illinois Commerce Comm'n v. Resource Technology Corp.*, Ill. Comm. Comm'n No. 02-0461 (July 10, 2002). The citation order was prompted by a Commission staff report alleging that the Pontiac Facility no longer qualified as a QSWEF because of three violations: it was operating over its configured capacity of 10 megawatts; it was using fossil fuel (natural gas) as its

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[2] In 1987, the Illinois legislature adopted the Retail Rate Law to encourage the development of alternate energy production facilities. Pub. Act 85-882, § 3, eff. November 5, 1987 (adding Ill.Rev.Stat.1987, Ch. 111 2/3, par. 8-403.1); *see also New Heights Recovery & Power, LLC v. Bower*, 347 Ill. App. 3d 89, 92, 806 N.E.2d 1156, 282 Ill. Dec. 568 (2004). The Retail Rate Law required traditional utility companies to enter into 20-year contracts to purchase electricity from QSWEFs at a "retail rate" that was generally higher than the "avoided cost" rate QFs were entitled to receive under federal law. In return, the utility companies would receive tax credits from the State in an amount equal to the difference between the "retail rate" and "avoided cost rate." 220 ILCS 5/8-403.1(d) (West 2000); *Resource Technology Corp. v. Commonwealth Edison Co.*, 343 Ill. App. 3d 36, 39, 795 N.E.2d 936, 277 Ill. Dec. 268 (2003). In 1996, the Retail Rate Law was amended to redefine a QSWEF as a facility that uses landfill-generated methane gas as its primary fuel. Pub. Act 89-448, § 5, eff. March 14, 1996.

primary fuel rather than landfill-generated methane gas; and it had failed to file biannual and annual reports for years 1998 to 2001.

In response to the Commission's citation order, RTC filed a complaint for declaratory and injunctive relief seeking to enjoin the Commission's proceedings on the ground that the Commission's action was preempted by PURPA and federal regulations promulgated thereunder by FERC. Specifically, RTC claimed that the Commission was invading the exclusive jurisdiction of FERC by attempting to determine if the Pontiac Facility was entitled to remain certified as a QF under PURPA. RTC also sought a declaratory ruling on the preemption issue and summary judgment on its request for the declaratory ruling.

After hearing arguments from both sides and considering the presented briefs, the trial court granted the Commission's motion to dismiss the complaint and denied RTC's motion for summary judgment. In arriving at its decision, the trial court stated that the "main issue raised is whether the Commission has the authority, as a matter of law, to make its own determination that facilities such as Pontiac meet and maintain the criteria of QSWEFs independent of any determination of concurrent federal certification." The trial court reasoned that even though section 8-403.1(b) of the Retail Rate Law required a facility to, among other things, "possess characteristics" necessary to qualify as a QF under federal law before it could qualify as a QSWEF under state law,[3] this requirement did not

[3] Under section 8-403.1(b) of the Retail Rate Law, a QSWEF is defined as a facility which the Commission determines qualifies as a qualified solid waste energy facility under the Local Solid Waste

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invade the federal jurisdiction of FERC because the statute did not give the Commission the power to certify or decertify a facility as a QF under federal law.

The trial court determined that section 8-403.1(b) of the Retail Rate Law was not preempted by PURPA, but rather, was intended to work within the framework of PURPA. RTC now appeals from the trial court's decision.

ANALYSIS

RTC first contends that the Commission's proposed proceeding to review whether the Pontiac Facility is in violation of FERC fuel usage regulations (*i.e.*, whether the facility was using natural gas as its primary fuel rather than landfill-generated methane gas) is preempted by PURPA and federal regulations promulgated thereunder by FERC. Specifically, RTC claims that the Commission's review of the Pontiac Facility's QSWEF status based on alleged violation of FERC fuel usage regulations is preempted by PURPA because it would invade FERC's exclusive jurisdiction to determine a QF's fuel usage rate.[4] We must reject RTC's contentions.

Disposal Act (415 ILCS 10/1 *et seq.* (West 2000)); uses methane gas generated from landfills as its primary fuel; and "possess[es] characteristics" which enable it to qualify as a cogeneration or small power production facility under federal law. 220 ILCS 5/8-403.1(b) (West 2000).

The Local Solid Waste Disposal Act defines a QSWEF as either "(i) a solid waste pollution control facility * * * or (ii) a facility which uses methane gas generated from landfills." 415 ILCS 10/2(5) (West 2000).

[4] Under PURPA, a QF's use of fossil fuel (*i.e.*, coal, oil, or natural gas) "may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date

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Pursuant to the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2), Congress has the authority to preempt state law. *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 74-75, 110 S. Ct. 2270, 2275 (1990). In determining whether Congress has preempted state law, a reviewing court's task is to discern congressional intent. *English*, 496 U.S. at 78-79, 110 L. Ed. 2d at 74, 110 S. Ct. at 2275. This analysis begins with the assumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 595, 101 S. Ct. 2114, 2129 (1981). The question of whether a federal enactment preempts a state statute is a question of law subject to *de novo* review. *Cress v. Recreation Services, Inc.*, 341 Ill. App. 3d 149, 173, 795 N.E.2d 817, 277 Ill. Dec. 149 (2003).

Under the supremacy clause, a federal enactment can preempt a state statute in three circumstances. First, Congress can expressly state an intent to preempt state law (express preemption); second, intent to preempt may be reasonably inferred where federal regulation is so comprehensive that there is no room for supplementary state regulation or because the field is one in which the federal interest is so dominant that it displaces state regulation on the same subject (implied or field preemption); and third, state law is preempted to the extent that it actually conflicts with federal law (conflict preemption). *English*, 496 U.S. at 78-79, 110 L. Ed. 2d at 74-75, 110

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the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy." 18 C.F.R. § 292.204(b)(2) (2004) (the so-called 25% rule). *See New Charleston Power I, LP v. Federal Energy Regulatory Comm'n*, 312 U.S. App. D.C. 360, 56 F.3d 1430, 1433 (D.C. Cir. 1995).

S. Ct. at 2275; *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 99 L. Ed. 2d 316, 325, 108 S. Ct. 1145, 1150 (1988). Conflict preemption may occur where it is impossible for a private party to comply with both state and federal requirements or where the state regulation stands as an obstacle to fully achieving the federal objective. *English*, 496 U.S. at 79, 110 L. Ed. 2d at 74-75, 110 S. Ct. at 2275; *Schneidewind*, 485 U.S. at 300, 99 L. Ed. 2d at 325, 108 S. Ct. at 1150.

In the instant case, RTC asserts that the Commission's proposal to review the Pontiac Facility's QSWEF status based on alleged violation of FERC fuel usage regulations is preempted on conflict-preemption principles. RTC contends that if the Commission is allowed to conduct such a review, it would undermine the policy and purposes of PURPA by invading FERC's exclusive jurisdiction to determine a facility's QF status as it relates to federal fuel usage rates. RTC's contention is meritless.

There is no conflict between FERC's use of the federal fuel usage regulation in assessing the Pontiac Facility's status as a QF under federal law and the Commission's utilization of the same regulation in determining whether the facility should remain certified as a QSWEF under state law. In the event the Pontiac Facility's QSWEF status is revoked under the Retail Rate Law and it is no longer eligible to receive a state-subsidized "retail rate," this determination would not interfere with the facility's designation as a QF under PURPA and would not affect the facility's right to continue receiving federal benefits in the form of "avoided cost rates."

The Commission is not attempting to determine whether the Pontiac Facility's fuel usage rate complies

with federal law as it relates to the facility's status as a QF under PURPA. Rather, the Commission is attempting to determine, *inter alia*, whether the Pontiac Facility violated federal fuel usage rates, and if so, whether this violation prevents the facility from being recertified as a QSWEF under the State's Retail Rate Law. In this regard, the Commission's review does not stand as an obstacle to the accomplishment and execution of FERC's objectives under PURPA. Indeed, the Commission's proposed review furthers the federal objective of ensuring that certified facilities have a primary fuel source which is 75% biomass (*i.e.*, non-fossil-fuel organic matter), waste, renewable resources (*e.g.*, wind, solar or hydropower), geothermal resources, or a combination thereof. *See* 18 C.F.R. § 292.204(b)(1)(i) (2004). RTC has not carried its burden of establishing that the Commission's proposed review is preempted by federal law.

RTC next contends that the statutory definition of "Qualified Solid Waste Energy Facility" (QSWEF), as set forth in the definitions section of the Illinois Administrative Code (Illinois Code) (83 Ill. Adm. Code § 445.20 (2003)), indicates that a facility's status as a QSWEF is "unequivocally" established when the facility files a valid FERC QF-certification with the Commission. RTC claims that once a facility obtains a valid, FERC-issued QF-certification and afterwards files that QF-certification with the Commission and becomes certified as a QSWEF under the Illinois Code, any subsequent attempts by the Commission to reevaluate the facility's QSWEF status on alleged violations of federal fuel usage regulations runs afoul of the Commission's own regulations, since under the regulations a facility's status as a QF under FERC automatically establishes its status as a QSWEF under state law. In addition, RTC maintains that nothing in the

Commission's regulations allow or contemplate the Commission addressing the issue of FERC fuel usage regulations in reevaluating a facility's QSWEF status. Again, we must reject RTC's contentions.

Section 445.20 of Title 83 of the Illinois Code defines a QSWEF in relevant part as follows:

> "'Qualified Solid Waste Energy Facility' (QSWEF) means a facility that meets the criteria set forth in 18 CFR 292[5], and the Local Solid Waste Disposal Act * * * , or an electric generating facility which uses methane gas generated from landfills and meets such requirements of 18 CFR 292." 83 Ill. Adm. Code § 445.20 (2003).

In turn, section 445.30 of Title 83 of the Illinois Code, entitled "Availability of Benefits," states in relevant part as follows:

> "a) The benefits of this Part shall apply to any qualified solid waste energy facility. The owner(s) or operator of such a facility shall petition the Commission for a determination that the facility meets the requirements and criteria specified in the Act[6] and this Part. These requirements include complying with the procedures for obtaining qualifying status set forth in

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[5] Section 292.101 of the Code of Federal Regulations (CFR) defines a "QF" as follows:

> "Qualifying facility means a cogeneration facility or a small power production facility that is a qualifying facility under Subpart B of this part." 18 C.F.R. § 292.101 (2000).

[6] "Act" is defined in the Illinois Code to mean the Illinois Public Utilities Act (which includes the Retail Rate Law) (220 ILCS 5/1-101 *et seq.* (West 2000)). 83 Ill. Adm. Code § 445.20 (2004).

18 CFR 292 and with the Local Solid Waste Disposal Act.

b) In demonstrating compliance with 18 CFR 292, the owner(s) or operator of a facility must file with the Commission a copy of:

1) the notice filed with [FERC] pursuant to 18 CFR 292.207, or

2) certification as a qualifying facility issued by the [FERC] or a successor agency." 83 Ill. Adm. Code § 445.30(a), (b)(1), (b)(2) (2003).

RTC argues that pursuant to section 445.30(b) of the Illinois Code, a facility can establish itself as a QSWEF simply by filing either a FERC-issued QF-certification with the Commission or a notice of application for such certification. The problem with RTC's argument is that pursuant to section 445.30(a) of the Illinois Code, in order for a facility to receive state benefits under the Illinois statute, the facility must not only comply with 18 C.F.R. 292, it must also meet the requirements and criteria specified in the Illinois Public Utilities Act, which includes the Retail Rate Law.

Under section 8-403.1(b) of the Retail Rate Law, a QSWEF is defined as a facility that the Commission determines qualifies as a qualified solid waste energy facility under the Local Solid Waste Disposal Act; uses methane gas generated from landfills as its primary fuel; and possesses characteristics that enable it to qualify as a cogeneration or small power production facility under federal law. 220 ILCS 5/8-403.1(b) (West 2000).

Pursuant to the Illinois Public Utilities Act, the Commission has the authority to determine whether the

Pontiac Facility's violation of federal fuel usage rates prevent the facility from being recertified as a QSWEF under the State's Retail Rate Law. *See, e.g., Continental Mobile Telephone Co. v. Illinois Commerce Comm'n*, 269 Ill. App. 3d 161, 167, 645 N.E.2d 516, 206 Ill. Dec. 511 (1994) (Commission derives its authority from the Illinois Public Utilities Act); *Local 777 v. Illinois Commerce Comm'n*, 45 Ill. 2d 527, 535, 260 N.E.2d 225 (1970) (Commission regulates all public utilities pursuant to the Illinois Public Utilities Act).

In sum, a facility's status as a QSWEF is not automatically established merely because the facility files a FERC QF-certification with the Commission or a notice of application for such certification. In addition, even after a facility is certified as a QSWEF, the Commission has the authority under the Illinois Public Utilities Act to reevaluate whether the facility has continued to satisfy the requirements necessary to retain its status as a QSWEF.

Finally, RTC asserts that the trial court erred by relying on the statutory phrase "possesses characteristics," contained in section 8-403.1(b) of the Retail Rate Law, in finding that the Commission had the authority to reassess the Pontiac Facility's fuel usage rate. We must reject RTC's argument.

In granting the Commission's motion to dismiss the complaint and denying RTC's motion for summary judgment, the trial court reasoned that even though section 8-403.1(b) of the Retail Rate Law required a facility to "possess characteristics" necessary to qualify as a QF under federal law before it could qualify as a QSWEF under state law, this requirement did not invade the federal jurisdiction of FERC because the Illinois statute

did not give the Commission the power to certify or decertify a facility as a QF under federal law. As set forth above, the trial court's analysis in this regard was correct. The trial court did not err by utilizing the phrase "possesses characteristics" in its analysis.

Accordingly, for the reasons set forth above, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

BURKE, P.J., and GARCIA, J., concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Resource Technology Corporation,	)	
Plaintiff,	)	
v.	)	02 CH 18158
Illinois Commerce Commission.	)	
Defendants.	)	

ORDER

This matter is before the court on the Defendants' motion to dismiss pursuant to 735 ILCS 5/2-619 and Plaintiff's Motion for Summary Judgment. The court is fully advised in the premises having heard oral argument and considered all briefs presented.

Resource Technology Corporation ("RTC"), is in the business of collecting methane gas generated by landfills and converting it into usable energy. RTC has 15 facilities in Illinois, one of which is the Pontiac facility. In order to conduct business, RTC must be certified pursuant to state and federal guidelines.

In 1997, RTC petitioned the Illinois Commerce Commission ("Commission") to make a determination that RTC's facilities met the requirements of a Qualified Solid Waste Energy Facility ("QSWEF") pursuant to the Illinois Public Utility Act, 220 ILCS 5/8-403.1 ("Act"), commonly referred to as the Retail Rate Law. The Pontiac facility, along with the other facilities, was so certified. The Retail Rate Law is administered solely by the Commission.

A QSWEF is defined by the Act as:

> "a facility determined by the Illinois Commerce Commission to qualify as such under the Local Solid Waste Disposal Act, to use methane gas generated from landfills as its primary fuel, and to possess characteristics that would enable it to qualify as a co-generation or small power production facility under federal law."

Having obtained the state certification, RTC was able to charge ComEd a favorable purchase rate, or "retail rate," equal to the average amount per kilowatt hour paid from time to time by the unit or units of local government in which the electricity generating facilities are located. . . . 220 ILCS 5/8-403.1(c). The retail rate is substantially higher than the wholesale rate the utilities pay for electricity. ComEd, in return, receives tax credits.

FEDERAL CERTIFICATION

In 1996, the Pontiac facility was certified by federal law pursuant to the Public Utilities Regulatory Policies Act ("PURPA"), USC 824a-3. Pontiac was designated a "qualifying small power production facility ("QF"). PURPA is administered by the Federal Energy Regulatory Commission ("FERC"). As a QF, Pontiac is entitled to charge the purchasing utility an "avoided cost" rate. This rate is less favorable than the Illinois "retail rate" by several cents per kilowatt hour. The facility was recertified as a QF under PURPA in 2002.

In 2002, ComEd notified RTC that it would not pay the Rider 3 retail rate for energy supplied over 10 megawatts ("MW"). It was ComEd's position that the certification of the Pontiac facility as a QSWEF limited it to that

amount. RTC then filed an Emergency Petition in Bankruptcy Court to compel ComEd to pay the retail rate for all the energy supplied by Pontiac. ComEd then petitioned the Commission for a declaratory ruling on how much of the electricity generated by Pontiac was subject to the retail rate. The Commission's Energy Division completed a "Staff Report" on the Pontiac facility that included an analysis of the amount of fossil fuel (natural gas) used by the facility in addition to the methane gas.

While some fossil fuel was allowable, methane gas had to be the primary fuel, pursuant to both federal and state statutes. RTC does not deny that fossil fuel was used, but argues the amount used is allowable. The Staff Report initiated Proceeding 02-0461 to reconsider the QF status of the Pontiac facility. The report cited three violations: Energy generated over the 10 MW capacity, unrestricted use of fossil fuel, and delinquent reporting. The Commission rejected RTC's argument that there was no 10 MW limit on the QSWEF statue of the Pontiac facility. RTC filed a complaint for declaratory judgment and injunctive relief asserting that the Commission is invading the jurisdiction of FERC in determining that Pontiac is not currently compliant with federal guidelines and is not entitled to QF status. This intervention will result, RTC argues, in the loss of millions of dollars (if it can't charge the avoided cost rate) without immediate resolution by the court. Plaintiff asks the court to declare that the Commission is outside its jurisdiction and enjoin it from going forward with Proceeding 02-0461, RTC acknowledges in its complaint that it has not exhausted its administrative remedies, but has opted not to pursue them because they would be "futile."

Under § 200.220 of the Administrative Code (83 Ill. Administrative Code (West 2000)), declaratory rulings of the Commission are not appealable. RTC asserts that the Public Utility Act, 83 Administrative Code Part 445.30 (1992), makes the only requirement for a facility to be certified as a QSEWF [sic] prior certification as a QF.

The Commission brought a motion to dismiss alleging no actual controversy exists. The commission alleges that RTC has created an artificial controversy for the purpose of "supplanting an ongoing proceeding" and "seeks to avoid liability for past actions." The Commission also maintains that injunctive relief would be inappropriate. The complaint deals with only one of the three violations addressed in the staff report from the Commission, it asks the court to enjoin further proceedings by the Commission. The Commission points out that FERC does not make specific determination regarding the certification of QFs. The facilities are allowed to certify themselves in what amounts to an honor system. Although, under FERC, the Pontiac facility complies with federal guidelines, that determination was actually made by RTC, not FERC. The Commission argues that the purpose of Proceeding 02-0461 was to determine whether the Pontiac facility still qualifies as a QSWEF, not a QF. A determination that RTC's Pontiac facility no longer meets the requirements of a QSWEF does not affect its status as a QF. The Act authorizes the Commission to make that determination. The Commission further argues that RTC has failed to exhaust its administrative remedies.

DISCUSSION

The sole basis of the Complaint is the allegation that the Commission seeks to use its jurisdiction to affect federal certification under PURPA. The main issue raised is whether the Commissions has the authority, as a matter of law, to make its own determination that facilities such as Pontiac meet and maintain the criteria of QSWEF's independent of any determination of concurrent federal certification. Under the Act, to qualify as a QSWEF, a facility must possess characteristics that would enable it to qualify a cogeneration or small power production facility under federal law. No statutory guidance or case law could be found that interprets the phrase "possess characteristics." It seems, therefore, that the Commission may make reasonable interpretations of the phrase.

In *RTC v. ComEd*, 2003 Ill.App. Lexis 1011 (1st Dist. 2003), ComEd sought a declaratory ruling by the Commission to determine whether it was required to pay the retail rate to RTC for electricity generated at the Pontiac facility that exceeded the "configured capacity" of 10 MW. The Commission ruled in ComEd's favor. However, the Appellate Court held that the Commission did not really hold a declaratory ruling proceeding. Under § 200.220 of the Administrative Code, the "Affected person" may petition for a declaratory ruling. The court held that RTC was the "affected person," not ComEd. Therefore, ComEd was not entitled to a declaratory ruling and the court had jurisdiction to hear the appeal. The court also held that the 1997 Order at issue did not set a maximum output for individual RTC facilities, but set a total output for the 15 facilities at 65 MW. While the Appellate Court resolved the output issue, the fossil fuel issue and the failure to file timely reports remain to be resolved by the Commission.

The "jurisdiction" issue, raised in this Complaint, was not addressed by the Appellate Court.

Under the Retail Rate Law, the Commission is empowered to determine whether RTC possesses characteristics that would enable it qualify as a QF. RTC claims that when a facility is certified as a QF, certification as a QSWEF is automatic:

> In demonstrating compliance with 18 CFR 292, the owner(s) or operator of a facility must file with the Commission a copy of:
>
> 1. the notice filed with the Federal Energy Regulatory Commission pursuant to 18 CFR 292.207 or
>
> 2. certification as a qualifying facility issued by the Federal Energy Regulatory Commission or a successor agency.

83 Illinois Administrative Code Sec. 445.30.

The Commission argues that RTC wants to self-certify the Pontiac facility as a QF and not be subject to regulation by the state, even though the self-certification entitles it to be a QSWEF (according to RTC), qualifying it for both the avoided const [sic] rate (federal), and the retail rate (state).

The parties have cited *Independent Energy Producers Assoc. v. California Public Utilities Commission*, 36 F.3d 848 (1994). In that case, California devised a program in which utilities and the CPUC monitored compliance with PURPA requirements. If a designated QF failed to meet the operating and efficiency standards, the state and utilities had the power to suspend payment at the "avoided cost" rate and substitute a lower alternative rate. The court held that the state and the utilities ahs [sic]

overstepped their bounds. Only FERC has the power to decertify a QF. The court noted, however, that Congress expressed it [sic] preference to let the states retain the primary regulatory role. "Because reasonable monitoring by the state and by utilities does not by itself effect a determination of status, it falls within the state's broad ratemaking authority." *Id.*

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the stat [sic] law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Independent Energy Producers Assoc., et al v. California Public Utilities Commission, 36 F.3d 848 (1994). Quoting *Louisiana Pub. Service Commission v. FCC*, 476 U.S. 355 (1986)

Unlike *Independent Energy Producers*, the instant case does not involve an attempt by a state or utility to decertify a QF. The Retail Rate Law and PURPA are meant to work together. Not only is the state statute not pre-empted by federal law, the Retail Rate Law was intended to work within the framework of PURPA. Nothing in the state statute conflicts with the federal regulations.

Since *RTC v. ComEd* was not dispositive of all issues, and the issue of pre-emption remains, the Court retains jurisdiction to rule on the motions of summary judgment and the motions to dismiss. The Court finds the Commission's authority to regulate a QSWEF is valid as long as the Public Utility Act (Retail Rate Law) remains in force. The issue is purely legal. RTC has not attacked the validity of the Retail Rate Law, only the alleged attempt by the Commission to invade the jurisdiction of FERC. By empowering the Commission to determine if facilities "possess characteristics" of qualified QF's, the statute does not give the Commission the power to certify or decertify the facility as a QF. There is not [sic] indication that the Commission has to do anything beyond the authority given to it by statute. The hearing before the Commission should proceed.

Accordingly, it is hereby ADJUDGED ORDERED and DECREED that:

Resource Technology Corporation's motion for summary judgment is DENIED and the Illinois Commerce Commission's Motion to Dismiss is GRANTED.

	/s/ Aaron Jaffe
DATE	HON. AARON JAFFE

RESOURCE TECH CORP v. IL COMMERCE COMM.

1-04-0188

**APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, SECOND DIVISION**

2005 Ill. App. LEXIS 130

February 2, 2005, Decided

OPINION:

REHEARING DENIED.

Resource Technology Corporation, petitioner, v. Illinois Commerce Commission, respondent.

No. 100231

SUPREME COURT OF ILLINOIS

215 Ill. 2d 619; 2005 Ill. LEXIS 829

May 25, 2005, Decided
May 2005 Term, Filed

OPINION:

Petition for leave to appeal denied.

16 U.S.C.S. § 796. Definitions

The words defined in this section shall have the following meanings for purposes of this Act [16 USCS §§ 791a et seq.], to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 4 of this Act [16 USCS § 797], and any assignee or successor in interest thereof;

(6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) "Navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs

directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published

and promulgated as a part of the rules and regulations of the Commission;

(14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively;

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this Act [16 USCS §§ 791a et seq.][;]

(17)(A) "small power production facility" means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which –

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy –

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent –

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility –

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(E) "eligible solar, wind, waste or geothermal facility" means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if –

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.[;]

(18)(A) "cogeneration facility" means a facility which produces –

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility which –

(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

(19) "Federal power marketing agency" means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) "evidentiary hearings" and "evidentiary proceeding" mean a proceeding conducted as provided in sections 554, 556, and 557 of Title 5, United States Code;

(21) "State regulatory authority" has the same meaning as the term "State commission", except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 3 of the Public Utility Regulatory Policies Act of 1978 [16 USCS § 2602]), such term means the Tennessee Valley Authority;

(22) "electric utility" means any person or State agency (including any municipality) which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency.[;]

(23) Transmitting utility. The term "transmitting utility" means any electric utility, qualifying cogeneration facility, qualifying small power production facility, or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale.[;]

(24) Wholesale transmission services. The term "wholesale transmission services" means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce. [; and]

(25) Exempt wholesale generator. The term "exempt wholesale generator" shall have the meaning provided by

section 32 of the Public Utility Holding Company Act of 1935 [15 USCS § 79z-6].

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16 U.S.C. § 824a-3. Cogeneration and small power production

(a) Cogeneration and small power production rules. Not later than 1 year after the date of enactment of this Act [Nov. 9, 1978], the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to –

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[,] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying

cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities. The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase –

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities. The rules prescribed under subsection (a) shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale –

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy". For purposes of this section, the term "incremental cost of alternative electric energy" means, with respect to electric energy purchased from a qualifying cogenerator or

qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions.

(1) Not later than 1 year after the date of enactment of this Act [Nov. 9, 1978] and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act [16 USCS § 796(17)(E)]) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission),

exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from –

(A) any State law or regulation in effect in a State pursuant to subsection (f),

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 USCS §§ 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act, or

(C) any license or permit requirement under part I of the Federal Power Act [16 USCS §§ 792 et seq.], any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities.

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each State regulatory authority shall, after notice and opportunity for

public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement.

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) in the same manner, and under the same requirements, as judicial review may be obtained under section 123 [16 USCS § 2633] in the case of a proceeding to which section 123 [16 USCS § 2633] applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f). Any such action shall be brought only in the manner, and under the requirements, as provided under section 123 [16 USCS § 2633] with respect to an action to which section 123 applies [16 USCS § 2633].

(h) Commission enforcement.

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) with respect to any operations of an electric utility, a qualifying

cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 USCS §§ 824 et seq.], such rule shall be treated as a rule under the Federal Power Act. Nothing in subsection (g) shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 USCS §§ 824 et seq.].

(2)(A) The Commission may enforce the requirements of subsection (f) against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) shall be treated as a rule enforceable under the Federal Power Act. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than –

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f)[,] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph

with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts. No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered into after the date of the enactment of this Act [Nov. 9, 1978] may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) New dams and diversions. Except for a hydroelectric project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 USCS § 796(10)]) at which non-Federal hydroelectric development is permissible, this section shall not apply to any hydroelectric project which impounds or diverts the water of a natural watercourse by means of a new dam or diversion unless the project meets each of the following requirements:

(1) No substantial adverse effects. At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality. Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act [16

USCS § 803] (whichever is appropriate as required by that Act or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project

(2) Protected rivers. At the time the application for a license or exemption for the project is accepted by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following:

(A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system.

(B) Any segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development.

(3) Fish and wildlife terms and conditions. The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act [16 USCS § 823a(c)].

(k) Definition of new dam or diversion. For purposes of this section, the term "new dam or diversion" means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices).

(l) Definitions. For purposes of this section, the terms "small power production facility", "qualifying small power production facility", "qualifying small power producer", "primary energy source", "cogeneration facility", "qualifying cogeneration facility", and "qualifying cogenerator" have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 USCS § 796(17) and (18)].

UNITED STATES PUBLIC LAWS
109th Congress – 1st Session
(c) 2005, LEXIS-NEXIS, A DIVISION OF
REED ELSEVIER INC. AND
REED ELSEVIER PROPERTIES INC.

1.

PUBLIC LAW 109-58 [H.R. 6]
AUG. 08, 2005

109 P.L. 58; 119 Stat. 594;
2005 Enacted H.R. 6; 109 Enacted H.R. 6

BILL TRACKING REPORT: 109 Bill Tracking H.R. 6
FULL TEXT VERSION(S) OF BILL: 109 H.R. 6

An Act

To ensure jobs for our future with secure, affordable, and reliable energy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled . . .

* * *

Sec. 1253. COGENERATION AND SMALL POWER PRODUCTION PURCHASE AND SALE REQUIREMENTS.

(a) Termination of Mandatory Purchase and Sale Requirements. – Section 210 of the Public Utility Regulatory Policies Act of 1978 (2. 16 U.S.C. 824a-3) is amended by adding at the end the following:

"(m) Termination of Mandatory Purchase and Sale Requirements. –

"(1) Obligation to purchase. – After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility hes nondiscriminatory access to – "(A)

(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or "(B)

(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining

whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

"(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

"(2) Revised purchase and sale obligation for new facilities. – (A) After the date of enactment of this subsection, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n).

"(B) For the purposes of this paragraph, the term 'existing qualifying cogeneration facility' means a facility that –

"(i) was a qualifying cogeneration facility on the date of enactment of subsection (m); or

"(ii) had filed with the Commission a notice of self-certification, self recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection (n).

"(3) Commission review. – Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A),

(B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met.

"(4) Reinstatement of obligation to purchase. – At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

"(5) Obligation to sell. – After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to sell electric energy to a qualifying cogeneration facility or a qualifying

small power production facility under this section if the Commission finds that –

"(A) competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

"(B) the electric utility is not required by State law to sell electric energy in its service territory.

"(6) No effect on existing rights and remedies. – Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on the date of enactment of this subsection, to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).

"(7) Recovery of costs. – (A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase.

"(B) A regulation under subparagraph (A) shall be enforceable in accordance with the provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

"(n) Rulemaking for New Qualifying Facilities. – (1)(A) Not later than 180 days after the date of enactment of this section, the Commission shall issue a rule revising the criteria in 18 CFR 292.205 for new qualifying cogeneration facilities seeking to sell electric energy pursuant to section 210 of this Act to ensure –

"(i) that the thermal energy output of a new qualifying cogeneration facility is used in a productive and beneficial manner;

"(ii) the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility; and

"(iii) continuing progress in the development of efficient electric energy generating technology.

"(B) The rule issued pursuant to paragraph (1)(A) of this subsection shall be applicable only to facilities that seek to sell electric energy pursuant to section 210 of this Act. For all other purposes, except as specifically provided in subsection (m)(2)(A), qualifying facility status shall be determined in accordance with the rules and regulations of this Act.

"(2) Notwithstanding rule revisions under paragraph (1), the Commission's criteria for qualifying cogeneration facilities in effect prior to the date on which the Commission issues the final rule required by paragraph (1) shall continue to apply to any cogeneration facility that –

"(A) was a qualifying cogeneration facility on the date of enactment of subsection (m), or

"(B) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by paragraph (1)."

(b) Elimination of Ownership Limitations. – (1) Qualifying small power production facility. – Section 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)) is amended to read as follows:

"(C) 'qualifying small power production facility' means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;".

(2) Qualifying cogeneration facility. – Section 3(18)(B) of the Federal Power Act (16 U.S.C. 796(18)(B)) is amended to read as follows:

"(B) 'qualifying cogeneration facility' means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;"

* * *

Sec. 1291. DEFINITIONS.

(a) Commission. – In this title, the term "Commission" means the Federal Energy Regulatory Commission.

(b) Amendment. – Section 3 of the Federal Power Act (1. 16 U.S.C. 796) is amended –

(1) by striking paragraphs (22) and (23) and inserting the following:

"(22) Electric utility. – (A) The term 'electric utility' means a person or Federal or State agency (including an entity described in section 201(f)) that sells electric energy.

"(B) The term 'electric utility' includes the Tennessee Valley Authority and each Federal power marketing administration.

"(23) Transmitting utility. – The term 'transmitting utility' means an entity (including an entity described in section 201(f)) that owns, operates, or controls facilities used for the transmission of electric energy –

"(A) in interstate commerce;

"(B) for the sale of electric energy at wholesale."; and

(2) by adding at the end the following:

"(26) Electric cooperative. – The term 'electric cooperative' means a cooperatively owned electric utility.

"(27) RTO. – The term 'Regional Transmission Organization' or 'RTO' means an entity of sufficient regional scope approved by the Commission –

"(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

"(B) to ensure nondiscriminatory access to the facilities.

"(28) ISO. – The term 'independent System Operator' or 'ISO' means an entity approved by the Commission –

"(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

"(B) to ensure nondiscriminatory access to the facilities.

"(29) Transmission organization. -- The term 'Transmission Organization' means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.".

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§ 220 ILCS 5/8-403.1. Electricity purchased from qualified solid waste energy facility; tax credit; distributions for economic development

Sec. 8-403.1. Electricity purchased from qualified solid waste energy facility; tax credit; distributions for economic development. (a) It is hereby declared to be the policy of this State to encourage the development of alternate energy production facilities in order to conserve our energy resources and to provide for their most efficient use.

(b) For the purpose of this Section and Section 9-215.1 [220 ILCS 5/9-215.1], "qualified solid waste energy facility" means a facility determined by the Illinois Commerce Commission to qualify as such under the Local Solid Waste Disposal Act [415 ILCS 10/1 et seq.], to use methane gas generated from landfills as its primary fuel, and to possess characteristics that would enable it to qualify as a

cogeneration or small power production facility under federal law.

(c) In furtherance of the policy declared in this Section, the Illinois Commerce Commission shall require electric utilities to enter into long-term contracts to purchase electricity from qualified solid waste energy facilities located in the electric utility's service area, for a period beginning on the date that the facility begins generating electricity and having a duration of not less than 10 years in the case of facilities fueled by landfill-generated methane, or 20 years in the case of facilities fueled by methane generated from a landfill owned by a forest preserve district. The purchase rate contained in such contracts shall be equal to the average amount per kilowatt-hour paid from time to time by the unit or units of local government in which the electricity generating facilities are located, excluding amounts paid for street lighting and pumping service.

(d) Whenever a public utility is required to purchase electricity pursuant to subsection (c) above, it shall be entitled to credits in respect to its obligations to remit to the State taxes it has collected under the Electricity Excise Tax Law [35 ILCS 640/2-1 et seq.] equal to the amounts, if any, by which payments for such electricity exceed (i) the then current rate at which the utility must purchase the output of qualified facilities pursuant to the federal Public Utility Regulatory Policies Act of 1978, [16 U.S.C. § 2601 et seq.] less (ii) any costs, expenses, losses, damages or other amounts incurred by the utility, or for which it becomes liable, arising out of its failure to obtain such electricity from such other sources. The amount of any such credit shall, in the first instance, be determined by the utility, which shall make a monthly report of such

credits to the Illinois Commerce Commission and, on its monthly tax return, to the Illinois Department of Revenue. Under no circumstances shall a utility be required to purchase electricity from a qualified solid waste energy facility at the rate prescribed in subsection (c) of this Section if such purchase would result in estimated tax credits that exceed, on a monthly basis, the utility's estimated obligation to remit to the State taxes it has collected under the Electricity Excise Tax Law [35 ILCS 640/2-1 et seq.]. The owner or operator shall negotiate facility operating conditions with the purchasing utility in accordance with that utility's posted standard terms and conditions for small power producers. If the Department of Revenue disputes the amount of any such credit, such dispute shall be decided by the Illinois Commerce Commission. Whenever a qualified solid waste energy facility has paid or otherwise satisfied in full the capital costs or indebtedness incurred in developing and implementing the qualified facility, the qualified facility shall reimburse the Public Utility Fund and the General Revenue Fund in the State treasury for the actual reduction in payments to those Funds caused by this subsection (d) in a manner to be determined by the Illinois Commerce Commission and based on the manner in which revenues for those Funds were reduced.

(e) The Illinois Commerce Commission shall not require an electric utility to purchase electricity from any qualified solid waste energy facility which is owned or operated by an entity that is primarily engaged in the business of producing or selling electricity, gas, or useful thermal energy from a source other than one or more qualified solid waste energy facilities.

(f) This Section does not require an electric utility to construct additional facilities unless those facilities are paid for by the owner or operator of the affected qualified solid waste energy facility.

(g) The Illinois Commerce Commission shall require that: (1) electric utilities use the electricity purchased from a qualified solid waste energy facility to displace electricity generated from nuclear power or coal mined and purchased outside the boundaries of the State of Illinois before displacing electricity generated from coal mined and purchased within the State of Illinois, to the extent possible, and (2) electric utilities report annually to the Commission on the extent of such displacements.

(h) Nothing in this Section is intended to cause an electric utility that is required to purchase power hereunder to incur any economic loss as a result of its purchase. All amounts paid for power which a utility is required to purchase pursuant to subparagraph (c) shall be deemed to be costs prudently incurred for purposes of computing charges under rates authorized by Section 9-220 of this Act [220 ILCS 5/9-220]. Tax credits provided for herein shall be reflected in charges made pursuant to rates so authorized to the extent such credits are based upon a cost which is also reflected in such charges.

(i) Beginning in February 1999 and through January 2009, each qualified solid waste energy facility that sells electricity to an electric utility at the purchase rate described in subsection (c) shall file with the Department of Revenue on or before the 15th of each month a form, prescribed by the Department of Revenue, that states the number of kilowatt hours of electricity for which payment was received at that purchase rate from electric utilities in

Illinois during the immediately preceding month. This form shall be accompanied by a payment from the qualified solid waste energy facility in an amount equal to sixtenths of a mill ($0.0006) per kilowatt hour of electricity stated on the form. Beginning on the effective date of this amendatory Act of the 92nd General Assembly [P.A. 92-435], a qualified solid waste energy facility must file the form required under this subsection (i) before the 15th of each month regardless of whether the facility received any payment in the previous month. Payments received by the Department of Revenue shall be deposited into the Municipal Economic Development Fund, a trust fund created outside the State treasury. The State Treasurer may invest the moneys in the Fund in any investment authorized by the Public Funds Investment Act, [30 ILCS 235/[1] et seq.], and investment income shall be deposited into and become part of the Fund. Moneys in the Fund shall be used by the State Treasurer as provided in subsection (j). The obligation of a qualified solid waste energy facility to make payments into the Municipal Economic Development Fund shall terminate upon either: (1) expiration or termination of a facility's contract to sell electricity to an electric utility at the purchase rate described in subsection (c); or (2) entry of an enforceable, final, and non-appealable order by a court of competent jurisdiction that Public Act 89-448 is invalid. Payments by a qualified solid waste energy facility into the Municipal Economic Development Fund do not relieve the qualified solid waste energy facility of its obligation to reimburse the Public Utility Fund and the General Revenue Fund for the actual reduction in payments to those Funds as a result of credits received by electric utilities under subsection (d).

A qualified solid waste energy facility that fails to timely file the requisite form and payment as required by this subsection (i) shall be subject to penalties and interest in conformance with the provisions of the Illinois Uniform Penalty and Interest Act [35 ILCS 735/3-1 et seq.].

Every qualified solid waste energy facility subject to the provisions of this subsection (i) shall keep and maintain records and books of its sales pursuant to subsection (c), including payments received from those sales and the corresponding tax payments made in accordance with this subsection (i), and for purposes of enforcement of this subsection (i) all such books and records shall be subject to inspection by the Department of Revenue or its duly authorized agents or employees.

When a qualified solid waste energy facility fails to file the form or make the payment required under this subsection (i), the Department of Revenue, to the extent that it is practical, may enforce the payment obligation in a manner consistent with Section 5 of the Retailers' Occupation Tax Act [35 ILCS 120/5], and if necessary may impose and enforce a tax lien in a manner consistent with Sections 5a, 5b, 5c, 5d, 5e, 5f, 5g, and 5i of the Retailers' Occupation Tax Act [35 ILCS 120/5a, 35 ILCS 120/5b, 35 ILCS 120/5c, 35 ILCS 120/5d, 35 ILCS 120/5e, 35 ILCS 120/5f, 35 ILCS 120/5g, and 35 ILCS 120/5i]. No tax lien may be imposed or enforced, however, unless a qualified solid waste energy facility fails to make the payment required under this subsection (i). Only to the extent necessary and for the purpose of enforcing this subsection (i), the Department of Revenue may secure necessary information from a qualified solid waste energy facility in a manner consistent with Section 10 of the Retailers' Occupation Tax Act [35 ILCS 120/10].

All information received by the Department of Revenue in its administration and enforcement of this subsection (i) shall be confidential in a manner consistent with Section 11 of the Retailers' Occupation Tax Act [35 ILCS 120/11]. The Department of Revenue may adopt rules to implement the provisions of this subsection (i).

For purposes of implementing the maximum aggregate distribution provisions in subsections (j) and (k), when a qualified solid waste energy facility makes a late payment to the Department of Revenue for deposit into the Municipal Economic Development Fund, that payment and deposit shall be attributed to the month and corresponding quarter in which the payment should have been made, and the Treasurer shall make retroactive distributions or refunds, as the case may be, whenever such late payments so require.

(j) The State Treasurer, without appropriation, must make distributions immediately after January 15, April 15, July 15, and October 15 of each year, up to maximum aggregate distributions of $500,000 for the distributions made in the 4 quarters beginning with the April distribution and ending with the January distribution, from the Municipal Economic Development Fund to each city, village, or incorporated town that has within its boundaries an incinerator that: (1) uses or, on the effective date of Public Act 90-813, used municipal waste as its primary fuel to generate electricity; (2) was determined by the Illinois Commerce Commission to qualify as a qualified solid waste energy facility prior to the effective date of Public Act 89-448; and (3) commenced operation prior to January 1, 1998. Total distributions in the aggregate to all qualified cities, villages, and incorporated towns in the 4 quarters beginning with the April distribution and ending

with the January distribution shall not exceed $500,000. The amount of each distribution shall be determined pro rata based on the population of the city, village, or incorporated town compared to the total population of all cities, villages, and incorporated towns eligible to receive a distribution. Distributions received by a city, village, or incorporated town must be held in a separate account and may be used only to promote and enhance industrial, commercial, residential, service, transportation, and recreational activities and facilities within its boundaries, thereby enhancing the employment opportunities, public health and general welfare, and economic development within the community, including administrative expenditures exclusively to further these activities. These funds, however, shall not be used by the city, village, or incorporated town, directly or indirectly, to purchase, lease, operate, or in any way subsidize the operation of any incinerator, and these funds shall not be paid, directly or indirectly, by the city, village, or incorporated town to the owner, operator, lessee, shareholder, or bondholder of any incinerator. Moreover, these funds shall not be used to pay attorneys fees in any litigation relating to the validity of Public Act 89-448. Nothing in this Section prevents a city, village, or incorporated town from using other corporate funds for any legitimate purpose. For purposes of this subsection, the term "municipal waste" has the meaning ascribed to it in Section 3.290 of the Environmental Protection Act [415 ILCS 5/3.290].

(k) If maximum aggregate distributions of $500,000 under subsection (j) have been made after the January distribution from the Municipal Economic Development Fund, then the balance in the Fund shall be refunded to

the qualified solid waste energy facilities that made payments that were deposited into the Fund during the previous 12-month period. The refunds shall be prorated based upon the facility's payments in relation to total payments for that 12-month period.

(l) Beginning January 1, 2000, and each January 1 thereafter, each city, village, or incorporated town that received distributions from the Municipal Economic Development Fund, continued to hold any of those distributions, or made expenditures from those distributions during the immediately preceding year shall submit to a financial and compliance and program audit of those distributions performed by the Auditor General at no cost to the city, village, or incorporated town that received the distributions. The audit should be completed by June 30 or as soon thereafter as possible. The audit shall be submitted to the State Treasurer and those officers enumerated in Section 3-14 of the Illinois State Auditing Act [30 ILCS 5/3-14]. If the Auditor General finds that distributions have been expended in violation of this Section, the Auditor General shall refer the matter to the Attorney General. The Attorney General may recover, in a civil action, 3 times the amount of any distributions illegally expended. For purposes of this subsection, the terms "financial audit," "compliance audit", and "program audit" have the meanings ascribed to them in Sections 1-13 and 1-15 of the Illinois State Auditing Act [30 ILCS 5/1-13; 30 ILCS 5/1-15 was repealed].

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18 C.F.R. § 292.101 Definitions.

(a) General rule. Terms defined in the Public Utility Regulatory Policies Act of 1978 (PURPA) shall have the

same meaning for purposes of this part as they have under PURPA, unless further defined in this part.

(b) Definitions. The following definitions apply for purposes of this part.

(1) Qualifying facility means a cogeneration facility or a small power production facility that is a qualifying facility under Subpart B of this part.

(i) A qualifying facility may include transmission lines and other equipment used for interconnection purposes (including transformers and switchyard equipment), if:

(A) Such lines and equipment are used to supply power output to directly and indirectly interconnected electric utilities, and to end users, including thermal hosts, in accordance with state law; or

(B) Such lines and equipment are used to transmit supplementary, standby, maintenance and backup power to the qualifying facility, including its thermal host meeting the criteria set forth in *Union Carbide Corporation*, 48 FERC 61,130, reh'g denied, 49 FERC 61,209 (1989), aff'd sub nom., *Gulf States Utilities Company v. FERC*, 922 F.2d 873 (D.C. Cir. 1991); or

(C) If such lines and equipment are used to transmit power from other qualifying facilities or to transmit standby, maintenance, supplementary and backup power to other qualifying facilities.

(ii) The construction and ownership of such lines and equipment shall be subject to any applicable Federal, state, and local siting and environmental requirements.

(2) Purchase means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

(3) Sale means the sale of electric energy or capacity or both by an electric utility to a qualifying facility.

(4) System emergency means a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property.

(5) Rate means any price, rate, charge, or classification made, demanded, observed or received with respect to the sale or purchase of electric energy or capacity, or any rule, regulation, or practice respecting any such rate, charge, or classification, and any contract pertaining to the sale or purchase of electric energy or capacity.

(6) Avoided costs means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.

(7) Interconnection costs means the reasonable costs of connection, switching, metering, transmission, distribution, safety provisions and administrative costs incurred by the electric utility directly related to the installation and maintenance of the physical facilities necessary to permit interconnected operations with a qualifying facility, to the extent such costs are in excess of the corresponding costs which the electric utility would have incurred if it had not engaged in interconnected operations, but instead generated an equivalent amount of electric energy itself or purchased

an equivalent amount of electric energy or capacity from other sources. Interconnection costs do not include any costs included in the calculation of avoided costs.

(8) Supplementary power means electric energy or capacity supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself.

(9) Back-up power means electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generation equipment during an unscheduled outage of the facility.

(10) Interruptible power means electric energy or capacity supplied by an electric utility subject to interruption by the electric utility under specified conditions.

(11) Maintenance power means electric energy or capacity supplied by an electric utility during scheduled outages of the qualifying facility.

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18 C.F.R. § 292.201 Scope.

This subpart applies to the criteria for and manner of becoming a qualifying small power production facility and a qualifying cogeneration facility under sections 3(17)(C) and 3(18)(B), respectively, of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

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18 C.F.R. § 292.202 Definitions.

For purposes of this subpart:

(a) Biomass means any organic material not derived from fossil fuels;

(b) Waste means an energy input that is listed below in this subsection, or any energy input that has little or no current commercial value and exists in the absence of the qualifying facility industry. Should a waste energy input acquire commercial value after a facility is qualified by way of Commission certification pursuant to § 292.207(b), or self-certification pursuant to § 292.207(a), the facility will not lose its qualifying status for that reason. Waste includes, but is not limited to, the following materials that the Commission previously has approved as waste:

(1) Anthracite culm produced prior to July 23, 1985;

(2) Anthracite refuse that has an average heat content of 6,000 Btu or less per pound and has an average ash content of 45 percent or more;

(3) Bituminous coal refuse that has an average heat content of 9,500 Btu per pound or less and has an average ash content of 25 percent or more;

(4) Top or bottom subbituminous coal produced on Federal lands or on Indian lands that has been determined to be waste by the United States Department of the Interior's Bureau of Land Management (BLM) or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that the applicant shows that the latter coal is an extension of that determined by BLM to be waste.

(5) Coal refuse produced on Federal lands or on Indian lands that has been determined to be waste by the BLM or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that applicant shows that the latter is an extension of that determined by BLM to be waste.

(6) Lignite produced in association with the production of montan wax and lignite that becomes exposed as a result of such a mining operation;

(7) Gaseous fuels, except:

(i) Synthetic gas from coal; and

(ii) Natural gas from gas and oil wells unless the natural gas meets the requirements of § 2.400 of this chapter;

(8) Petroleum coke;

(9) Materials that a government agency has certified for disposal by combustion;

(10) Residual heat;

(11) Heat from exothermic reactions;

(12) Used rubber tires;

(13) Plastic materials; and

(14) Refinery off-gas.

(c) Cogeneration facility means equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy;

(d) Topping-cycle cogeneration facility means a cogeneration facility in which the energy input to the facility is first used to produce useful power output, and at least some of the reject heat from the power production process is then used to provide useful thermal energy;

(e) Bottoming-cycle cogeneration facility means a cogeneration facility in which the energy input to the system is first applied to a useful thermal energy application or process, and at least some of the reject heat emerging from the application or process is then used for power production;

(f) Supplementary firing means an energy input to the cogeneration facility used only in the thermal process of a topping-cycle cogeneration facility, or only in the electric generating process of a bottoming-cycle cogeneration facility;

(g) Useful power output of a cogeneration facility means the electric or mechanical energy made available for use, exclusive of any such energy used in the power production process;

(h) Useful thermal energy output of a topping-cycle cogeneration facility means the thermal energy:

(1) That is made available to an industrial or commercial process (net of any heat contained in condensate return and/or makeup water);

(2) That is used in a heating application (e.g., space heating, domestic hot water heating); or

(3) That is used in a space cooling application (i.e., thermal energy used by an absorption chiller).

(i) Total energy output of a topping-cycle cogeneration facility is the sum of the useful power output and useful thermal energy output;

(j) Total energy input means the total energy of all forms supplied from external sources;

(k) Natural gas means either natural gas unmixed, or any mixture of natural gas and artificial gas;

(l) Oil means crude oil, residual fuel oil, natural gas liquids, or any refined petroleum products; and

(m) Energy input in the case of energy in the form of natural gas or oil is to be measured by the lower heating value of the natural gas or oil.

(n) Electric utility holding company means a holding company, as defined in section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(7) which owns one or more electric utilities, as defined in section 2(a)(3) of that Act, 15 U.S.C. 79b(a)(3), but does not include any holding company which is exempt by rule or order adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3) or 79c(a)(5).

(o) Utility geothermal small power production facility means a small power production facility which uses geothermal energy as the primary energy resource and of which more than 50 percent is owned either:

(1) By an electric utility or utilities, electric utility holding company or companies, or any combination thereof.

(2) By any company 50 percent or more of the outstanding voting securities of which of which are directly or indirectly owned, controlled, or held with power to vote by an electric utility, electric utility holding company, or any combination thereof.

(p) New dam or diversion means a dam or diversion which requires, for the purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards of similar adjustable devices);

(q) Substantial adverse effect on the environment means a substantial alteration in the existing or potential use of, or a loss of, natural features, existing habitat, recreational uses, water quality, or other environmental resources. Substantial alteration of particular resource includes a change in the environment that substantially reduces the quality of the affected resources; and

(r) Commitment of substantial monetary resources means the expenditure of, or commitment to expend, at least 50 percent of the total cost of preparing an application for license or exemption for a hydroelectric project that is accepted for filing by the Commission pursuant to § 4.32(e) of this chapter. The total cost includes (but is not limited to) the cost of agency consultation, environmental studies, and engineering studies conducted pursuant to § 4.38 of this chapter, and the Commission's requirements for filing an application for license exemption.

(s) Sequential use of energy means:

(1) For a topping-cycle cogeneration facility, the use of reject heat from a power production process in

sufficient amounts in a thermal application or process to conform to the requirements of the operating standard; or

(2) For a bottoming-cycle cogeneration facility, the use of reject heat from a thermal application or process, at least some of which is then used for power production.

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18 C.F.R. § 292.203 General requirements for qualification.

(a) Small power production facilities. Except as provided in paragraph (c) of this section, a small power production facility is a qualifying facility if it:

(1) Meets the maximum size criteria specified in § 292.204(a);

(2) Meets the fuel use criteria specified in § 292.204(b); and

(3) Meets the ownership criteria specified in § 292.206.

(b) Cogeneration facilities. A cogeneration facility, including any diesel and dual-fuel cogeneration facility, is a qualifying facility if it:

(1) Meets any applicable operating and efficiency standards specified in § 292.205 (a) and (b); and

(2) Meets the ownership criteria specified in § 292.206.

(c) Hydroelectric small power production facilities located at a new dam or diversion. (1) A hydroelectric small power production facility that impounds or diverts

the water in a natural watercourse by means of a new dam or diversion (as that term is defined in § 292.202(p)) is a qualifying facility if it meets the requirements of:

(i) Paragraph (a) of this section; and

(ii) Section 292.208.

(2) [Removed and reserved, 57 FR 21734, May 22, 1992.]

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18 C.F.R. § 292.204 Criteria for qualifying small power production facilities.

(a) Size of the facility. – (1) Maximum size. There is no size limitation for an eligible solar, wind, waste or facility, as defined by section 3(17)(E) of the Federal Power Act. For a non-eligible facility, the power production capacity for which qualification is sought, together with the power production capacity of any other non-eligible small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) Method of calculation. (i) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and, for hydroelectric facilities, if they use water from the same impoundment for power generation.

(ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of a facility.

(3) Waiver. The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(b) Fuel use. (1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

(ii) Any primary energy source which, on the basis of its energy content, is 50 percent or more biomass shall be considered biomass.

(2) Use of oil, natural gas and coal by a facility, under section 3(17)(B) of the Federal Power Act, is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy.

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18 C.F.R. § 292.205 Criteria for qualifying cogeneration facilities.

(a) Operating and efficiency standards for topping-cycle facilities.

(1) Operating standard. For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must be no less than 5 percent of the total energy output during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy.

(2) Efficiency standard. (i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy, must:

(A) Subject to paragraph (a)(2)(i)(B) of this section be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; or

(B) If the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility.

(ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(i) of this section there is no efficiency standard.

(b) Efficiency standards for bottoming-cycle facilities. (1) For any bottoming-cycle cogeneration facility for which any of the energy input as supplementary firing is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy must be no less than 45 percent of the energy input of natural gas and oil for supplementary firing.

(2) For any bottoming-cycle cogeneration facility not covered by paragraph (b)(1) of this section, there is no efficiency standard.

(c) Waiver. The Commission may waive any of the requirements of paragraphs (a) and (b) of this section upon a showing that the facility will produce significant energy savings.

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18 C.F.R. § 292.206 Ownership criteria.

(a) General rule. A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

(b) Ownership test. For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding

company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric utility holding company.

(c) Exceptions. For purposes of this section a company shall not be considered to be an "electric utility" company if it:

(1) Is a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3), 79c(a)(5); or

(2) Is declared not to be an electric utility company by rule or order of the Securities and Exchange Commission pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3)(A).

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18 C.F.R. § 292.207 Procedures for obtaining qualifying status.

(a) Self-certification and pre-authorized Commission recertification. – (1) Self-certification. (i) A small power production facility or cogeneration facility that meets the applicable criteria established in § 292.203 is a qualifying facility.

(ii) The owner or operator of a facility or its representative self-certifying under this section must file with the Commission, and concurrently serve on each electric utility with which it expects to interconnect,

transmit or sell electric energy to or purchase supplementary, standby, back-up and maintenance power, and the State regulatory authority of each state where the facility and each affected utility is located, a notice of self-certification which contains a completed Form 556.

(iii) Subsequent notices of self-recertification for the same facility may reference prior notices or prior Commission certifications, and need only refer to changes which have occurred with respect to the facility since the prior notice or the prior Commission certification.

(iv) Notices of self-certification or self-recertification will not be published in the Federal Register.

(2) Pre-authorized Commission recertification. (i) For purposes of paragraph (b) of this section, the following alterations or modifications are not considered substantial alterations or modifications and will not result in revocation of qualifying status previously granted by the Commission pursuant to paragraph (b) of this section:

(A) A change which does not affect the upstream ownership of the facility;

(B) A change in the installation or operation date;

(C) A change in the manufacturer of the power generation equipment selected for the facility's installation when there is no change in capacity or operating characteristics;

(D) A change in the location of a cogeneration facility, or a small power production facility, if the new

location would not cause the facility to violate the 80 MW limitation of § 292.204(a)(1);

(E) A decrease in the amount of natural gas or oil or any change in the amount of other fuel used by a cogeneration facility, provided that the efficiency value and the operating value calculation for the facility remain at or above the values stated when the certification or recertification order was issued;

(F) A decrease in the amount of fossil fuel used by a small power production facility;

(G) A change in the primary energy source of a small power production facility, provided that the facility continues to comply with the requirements of § 292.204;

(H) An additional use of a cogeneration facility's thermal output, if the original uses are as stated when the certification order was issued;

(I) An increase in the efficiency value of a cogeneration facility or an increase in the operating value of a cogeneration facility determined in accordance with § 292.205;

(J) A decrease in the power production capacity of a small power production facility;

(K) A change in the power production capacity of a cogeneration facility if the efficiency value and the operating value calculation for the facility remain at or above the values stated when the certification or recertification order was issued; or

(L) A change in the purchaser of the cogeneration facility's thermal output, when there is no change in the specified thermal application or process.

(ii) The owner or operator of a qualifying facility that has been certified under paragraph (b) of this section must file with the Commission notice of each change listed in this subsection, and must concurrently serve a copy of such notice on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up and maintenance power, and the State regulatory authority of each state where the facility and each affected electric utility is located.

(b) Optional procedure – (1) Application for Commission certification. In lieu of the certification procedures in paragraph (a) of this section, an owner or operator of a facility or its representative may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by part 381 of this chapter.

(2) General contents of application. The application must include a completed Form 556.

(3) Commission action. (i) Within 90 days of the later of the filing of an application or the filing of a supplement, amendment or other change to the application, the Commission will either: inform the applicant that the application is deficient; or issue an order granting or denying the application; or toll the time for issuance of an order. Any order denying certification shall identify the specific requirements which were not met. If the Commission does not act within 90 days of the date of the latest

filing, the application shall be deemed to have been granted.

(ii) For purposes of paragraph (b) of this section, the date an application is filed is the date by which the Office of the Secretary has received all of the information and the appropriate filing fee necessary to comply with the requirements of this Part.

(4) Notice. The applicant must include a form of notice of the application suitable for publication in the Federal Register in accordance with the specifications in § 385.203(d) of this chapter. The form of notice shall be on electronic media as specified by the Secretary.

(c) Notice requirements for facilities of 500 kW or more. An electric utility is not required to purchase electric energy from a facility with a design capacity of 500 kW or more until 90 days after the facility notifies the utility that it is a qualifying facility, or 90 days after the facility has applied to the Commission under paragraph (b) of this section.

(d) Revocation of qualifying status (1)(i) If a qualifying facility fails to conform with any material facts or representations presented by the cogenerator or small power producer in its submittals to the Commission, the notice of self-certification of the qualifying status of the facility, pre-authorized Commission re-certification notice, or Commission order certifying the qualifying status of the facility may no longer be relied upon. At that point, if the facility continues to conform to the Commission's qualifying criteria under this part, the cogenerator or small power producer may file either a notice of self-recertification of qualifying status pursuant to the requirements of paragraph (a)(1) of this section, a pre-authorized Commission

recertification notice pursuant to the requirements of paragraph (a)(2) of this section, or an application for Commission recertification pursuant to the requirements of paragraph (b) of this section, as appropriate.

(ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the facility fails to conform to any of the Commission's qualifying facility criteria under this part.

(iii) The Commission may revoke the qualifying status of a self-certified qualifying facility upon the filing of a petition for a declaratory order that the self-certified qualifying facility does not meet applicable requirements for qualifying facilities.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under paragraph (b) of this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. This application for Commission recertification of qualifying status should be submitted in accordance with paragraph (b) of this section.

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18 C.F.R. § 292.208 Special requirements for hydroelectric small power production facilities located at a new dam or diversion.

(a) A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion (as that term is

defined in § 292.202(p)) is a qualifying facility only if it meets the requirements of:

(1) Paragraph (b) of this section;

(2) Section 292.203(c); and

(3) Part 4 of this chapter.

(b) A hydroelectric small power production described in paragraph (a) is a qualifying facility only if:

(1) The Commission finds, at the time it issues the license or exemption, that the project will not have a substantial adverse effect on the environment (as that term is defined in § 292.202(q)), including recreation and water quality;

(2) The Commission finds, at the time the application for the license or exemption is accepted for filing under § 4.32 of this chapter, that the project is not located on any segment of a natural watercourse which:

(i) Is included, or designated for potential inclusion in, a State or National wild and scenic river system; or

(ii) The State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural or scenic attributes which would be adversely affected by hydroelectric development; and

(3) The project meets the terms and conditions set by the appropriate fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act.

(c) For the Commission to make the findings in paragraph (b) of this section an applicant must:

(1) Comply with the applicable hydroelectric licensing requirements in Part 4 of this chapter, including:

(i) Completing the pre-filing consultation process under § 4.38 of this chapter, including performing any environmental studies which may be required under §§ 4.38(b)(2)(i)(D) through (F) of this chapter; and

(ii) Submitting with its application an environmental report that meets the requirements of § 4.41(f) of this chapter, regardless of project size;

(2) State whether the project is located on any segment of a natural watercourse which:

(i) Is included in or designated for potential inclusion in:

(A) The National Wild and Scenic River System (28 U.S.C. 1271-1278 (1982)); or

(B) A State wild and scenic river system;

(ii) Crosses an area designated or recommended for designation under the Wilderness Act (16 U.S.C. 1132) as:

(A) A wilderness area; or

(B) Wilderness study area; or

(iii) The State, either by or pursuant to an act of the State legislature, has determined to possess unique, natural, recreational, cultural, or scenic attributes that would be adversely affected by hydroelectric development.

(d) If the project is located on any segment of a natural watercourse that meets any of the conditions in paragraph (c)(2) of this section, the applicant must provide the following information in its application:

(1) The date on which the natural watercourse was protected;

(2) The statutory authority under which the natural watercourse was protected; and

(3) The Federal or state agency, or political subdivision of the state, that is in charge of administering the natural watercourse.

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18 C.F.R. § 292.209 Exceptions from requirements for hydroelectric small power production facilities located at a new dam or diversion.

(a) The requirements in §§ 292.208(b)(1) through (3) do not apply if:

(1) An application for license or exemption is filed for a project located at a Government dam, as defined in section 3(10) of the Federal Power Act, at which non-Federal hydroelectric development is permissible; or

(2) An application for license or exemption was filed and accepted before October 16, 1986.

(b) The requirements in §§ 292.208(b)(1) and (3) do not apply if an application for license or exemption was filed before October 16, 1986, and is accepted for filing by the Commission before October 16, 1989.

(c) The requirements in § 292.208(b)(3) do not apply to an applicant for license or exemption if:

(1) The applicant files a petition pursuant to § 292.210; and

(2) The Commission grants the petition.

(d) Any application covered by paragraphs (a), (b), or (c) of this section is excepted from the moratorium imposed by section 8(e) of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495.

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18 C.F.R. § 292.210 Petition alleging commitment of substantial monetary resources before October 16, 1986.

(a) An applicant covered by § 292.203(c) whose application for license or exemption was filed on or after October 16, 1986, but before April 16, 1988, may file a petition for exception from the requirement in § 292.208(b)(3) and the moratorium described in § 292.203(c)(2). The petition must show that prior to October 16, 1986, the applicant committed substantial monetary resources (as that term is defined in § 292.202(r)) to the development of the project.

(b) Subject to rebuttal under paragraph (d)(7)(ii) of this section, a showing of the commitment of substantial monetary resources will be presumed if the applicant held a preliminary permit for the project and had completed environmental consultations pursuant to § 4.38 of this chapter before October 16, 1986.

(c) Time of filing petition. – (1) General rule. Except as provided in paragraph (c)(2) of this section, the applicant must:

(i) File the petition with the application for license or exemption; or

(ii) Submit with the application for license or exemption a request for an extension of time, not to exceed 90 days or April 16, 1988, whichever occurs first, in which to file the petition.

(2) Exception. If the application for license or exemption was filed on or after October 16, 1986, but before March 23, 1987, the petition must have been filed by June 22, 1987.

(d) Filing requirements. A petition filed under this section must include the following information or refer to the pages in the application for license or exemption where it can be found:

(1) A certificate of service, conforming to the requirements set out in § 385.2010(h) of this chapter, certifying that the applicant has served the petition on the Federal and State agencies required to be consulted by the applicant pursuant to § 4.38 of this chapter;

(2) Documentation of any issued preliminary permits for the project;

(3) An itemized statement of the total costs expended on the application;

(4) An itemized schedule of costs the applicant expended, or committed to be expended, before October 16, 1986, on the application, accompanied by supporting documentation including but not limited to:

(i) Dated invoices for maps, surveys, supplies, geophysical and geotechnical services, engineering services,

legal services, document reproduction, and other items related to the preparation of the application, and

(ii) Written contracts and other written documentation demonstrating a commitment made before October 16, 1986, to expend monetary resources on the preparation of the application, together with evidence that those monetary resources were actually expended; and

(5) Correspondence or other documentation to support the items listed in paragraphs (d)(3) and (d)(4) of this section to show that the expenses presented were directly related to the preparation of the application.

(6) The applicant must include in its total cost statement and in its schedule of the costs expended or committed to be expended before October 16, 1986, the value of services that were performed by the applicant itself instead of contracted out.

(7)(i) If the applicant held a preliminary permit for the project and had completed pre-filing consultation pursuant to § 4.38 of this chapter prior to October 16, 1986, the applicant may, instead of submitting the information listed in paragraphs (d)(3), (d)(4), and (d)(5) of this section, submit a statement identifying the preliminary permit by project number.

(ii) If any interested person objects (pursuant to § 385.211 of this chapter) to the presumption in paragraph (b) of this section, the applicant must supply the information listed in paragraphs (d)(3), (d)(4), and (d)(5) of this section.

(8) If the application is deficient pursuant to § 4.32(e) of this chapter, the applicant must include with

the information correcting those deficiencies a statement of the costs expended to make the corrections

(e) Processing of petition. (1) The Commission will issue a notice of the petition filed under this section and publish the notice in the FEDERAL REGISTER. The petition will be available for inspection and copying during regular business hours in the Public Reference Room maintained by the Division of Public Information.

(2) Comments on the petition. The Commission will provide the public 45 days from the date the notice of the petition is issued to submit comments. The applicant for license or exemption has 15 days after the expiration of the public comment period to respond to the comments filed with the Commission.

(3) Commission action on petition. The Director of the Office of Hydropower Licensing will determine whether or not the applicant for license or exemption has made the showing required under this section.

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18 C.F.R. § 292.211 Petition for initial determination on whether a project has a substantial adverse effect on the environment (AEE petition).

(a) An applicant that has filed a petition under § 292.210 may also file an AEE petition with the Commission for an initial determination on whether the project satisfies the requirement that it has no substantial adverse effect on the environment as specified in § 292.208(b)(1).

(b) The filing of the AEE petition does not relieve the applicant of the filing requirements of § 292.208(c).

(c) The Commission will act on the AEE petition only if the Commission has granted the applicant's commitment of resources petition under § 292.210.

(d) Time of filing petition. The applicant may file the AEE petition with the application for license or exemption or at any time before the Commission issues the license or exemption.

(e) Contents of petition. The AEE petition must identify the project and request that the Commission make an initial determination on the adverse environmental effects requirements in § 292.208(b)(1).

(f) The Director of the Office of Hydropower Licensing will make the initial determination on the AEE petition. In making this determination, the Director will consider the following:

(1) Any proposed mitigative measures;

(2) The consistency of the proposal with local, regional, and national resource plans and programs;

(3) The mandatory terms and conditions of fish and wildlife agencies under section 210(j) of PURPA, or section 30(c) of the Federal Power Act; or the recommended terms and conditions of fish a [sic] wildlife agencies under Section 10(j) of the Federal Power Act, whichever is appropriate; and

(4) Any other information which the Director believes is relevant to consider.

(g) Initial finding on the petition. The Director of the Office of Hydropower Licensing will make the initial determination on the AEE petition after the close of the

public notice period for the accepted application. If the Director's initial determination finds:

(1) No substantial adverse effect on the environment, the Commission must wait at least 45 days before making a final determination that the project satisfies the requirements of § 292.208(b)(1).

(2) A substantial adverse effect on the environment, the applicant may file, within 90 days of the initial finding that the project does not satisfy the requirements in § 292.208(b)(1), proposed measures to mitigate the adverse environmental effects found.

(3)(i) The Commission will provide written notice of the Director's initial finding on the petition to the applicant, to the federal and state agencies that the applicant must consult under § 4.38 of this chapter and to any intervenors in the proceeding.

(ii) The Commission will publish notice of the Director's initial finding in the Federal Register.

(h) Notice and Comment on the Mitigative measures. (1) The Commission will issue notice of the mitigative measures filed by an applicant under paragraph (g)(2) of this section and will publish the notice in the Federal Register. The mitigative measures will be on file and available for inspection or copying during regular business hours in the Public Reference Room maintained by the Division of Public Information;

(2) The Commission will provide the State and interested persons within 90 days from the date the notice is issued to review and submit comments on the mitigative measures. The applicant for license or exemption has 15

days after the expiration of the public comment period to respond to the comments filed with the Commission.

(i) Material amendments to application. The proposed mitigative measures filed under paragraph (g)(2) of this section will not be considered a material amendment to the application unless the Commission finds that the proposed measures are unnecessary to, or exceed the scope of, mitigating substantial adverse effects. If the Commission finds the proposed mitigative measures constitute a material amendment, the application will be considered filed with the Commission on the date on which the applicant filed the proposed mitigative measures, and all other provisions of § 4.35(a) of this chapter will apply.

(j) Final determination on the petition. The Commission will make a final determination on the petition at the time the Commission issues a license or exemption for the project.

(k) Presumption (1) If, between the Commission's initial and final findings on the AEE petition, the State does not take any action under § 292.208(b)(2), the failure to take action can be the basis for a presumption that there is not substantial adverse effect on the environment (as that term is defined in § 292.202(q)).

(2) If the presumption in paragraph (k)(1) of this section comes into effect, it:

(i) Is only available for those adverse effects related to the natural, recreational, cultural, or scenic attributes of the environment;

(ii) Can only operate during the time between the Commission's initial and final findings on the AEE petition; and

(iii) Has no affect on the Commission's independent obligation to find that the project will not have a substantial adverse effect on the environment under § 292.208(b)(1).

(3) The presumption in paragraph (k)(1) of this section does not take effect if the State, the Commission or an interested person demonstrates that the State has acted to protect the natural watercourse under § 292.208(b)(2).

(4) The presumption in paragraph (k)(1) of this section can be rebutted if:

(i) The Commission determines that the project will have a substantial adverse effect on the environment related to the environmental attributes listed in paragraph (k)(2)(i) of this section; or

(ii) Any interested person, including a State, demonstrates that the project will have a substantial adverse effect on the environment related to the environmental attributes listed in paragraph (k)(2)(i) of this section.

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18 C.F.R. § 292.301 Scope.

(a) Applicability. This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(b) Negotiated rates or terms. Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which

differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

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18 C.F.R. § 292.302 Availability of electric utility system cost data.

(a) Applicability. (1) Except as provided in paragraph (a)(2) of this section, paragraph (b) applies to each electric utility, in any calendar year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(2) Each utility having total sales of electric energy for purposes other than resale of less than one billion kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding year, shall not be subject to the provisions of this section until June 30, 1982.

(b) General rule. To make available data from which avoided costs may be derived, not later than November 1, 1980, June 30, 1982, and not less often than every two years thereafter, each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection, and each nonregulated electric utility described in paragraph (a) of this section shall maintain for public inspection, the following data:

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component; for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next 5 years;

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of fine energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

(c) Special rule for small electric utilities. (1) Each electric utility (other than any electric utility to which paragraph (b) of this section applies) shall, upon request:

(i) Provide comparable data to that required under paragraph (b) of this section to enable qualifying facilities to estimate the electric utility's avoided costs for periods described in paragraph (b) of this section; or

(ii) With regard to an electric utility which is legally obligated to obtain all its requirements for electric energy and capacity from another electric utility, provide the data of its supplying utility and the rates at which it currently purchases such energy and capacity.

(2) If any such electric utility fails to provide such information on request, the qualifying facility may apply to the State regulatory authority (which has ratemaking authority over the electric utility) or the Commission for an order requiring that the information be provided.

(d) Substitution of alternative method. (1) After public notice in the area served by the electric utility, and after opportunity for public comment, any State regulatory authority may require (with respect to any electric utility over which it has ratemaking authority), or any nonregulated electric utility may provide, data different than those which are otherwise required by this section if it determines that avoided costs can be derived from such data.

(2) Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated utility which requires such different data shall notify the Commission within 30 days of making such determination.

(e) State Review. (1) Any data submitted by an electric utility under this section shall be subject to review by the State regulatory authority which has ratemaking authority over such electric utility.

(2) In any such review, the electric utility has the burden of coming forward with justification for its data.

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18 C.F.R. § 292.303 Electric utility obligations under this subpart.

(a) Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) Obligation to sell to qualifying facilities. Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, any energy and capacity requested by the qualifying facility.

(c) Obligation to interconnect. (1) Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnections with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under Part II of the Federal Power Act.

(d) Transmission to other electric utilities. If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission

(e) Parallel operation. Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

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18 C.F.R. § 292.304 Rates for purchases.

(a) Rates for purchases. (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) Relationship to avoided costs. (1) For purposes of this paragraph, "new capacity" means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section

(3) A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production.

(4) Rates for purchases from new capacity shall be in accordance with paragraph (b)(2) of this section, regardless of whether the electric utility making such purchases is simultaneously making sales to the qualifying facility.

(5) In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.

(c) Standard rates for purchases. (1) There shall be put into effect (with respect to each electric utility) standard rates for purchases from qualifying facilities with a design capacity of 100 kilowatts or less.

(2) There may be put into effect standard rates for purchases from qualifying facilities with a design capacity of more than 100 kilowatts.

(3) The standard rates for purchases under this paragraph:

(1) Shall be consistent with paragraphs (a) and (e) of this section; and

(ii) May differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.

(d) Purchases "as available" or pursuant to a legally enforceable obligation. Each qualifying facility shall have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

(e) Factors affecting rates for purchases. In determining avoided costs, the following factors shall, to the extent practicable, be taken into account:

(1) The data provided pursuant to § 292.302(b), (c), or (d), including State review of any such data;

(2) The availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, including:

(i) The ability of the utility to dispatch the qualifying facility;

(ii) The expected or demonstrated reliability of the qualifying facility;

(iii) The terms of any contract or other legally enforceable obligation, including the duration of the obligation, termination notice requirement and sanctions for non-compliance;

(iv) The extent to which scheduled outages of the qualifying facility can be usefully coordinated with scheduled outages of the utility's facilities;

(v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies, including its ability to separate its load from its generation;

(vi) The individual and aggregate value of energy and capacity from qualifying facilities on the electric utility's system; and

(vii) The smaller capacity increments and the shorter lead times available with additions of capacity from qualifying facilities; and

(3) The relationship of the availability of energy or capacity from the qualifying facility as derived in paragraph (e)(2) of this section, to the ability of the electric

utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use; and

(4) The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity.

(f) Periods during which purchases not required. (1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.

(3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

(4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State

regulatory authority determines necessary or appropriate, either before or after the occurrence.

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18 C.F.R. § 292.305 Rates for sales.

(a) General rules. (1) Rates for sales:

(i) Shall be just and reasonable and in the public interest; and

(ii) Shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.

(2) Rates for sales which are based on accurate data and consistent systemwide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics.

(b) Additional Services to be Provided to Qualifying Facilities. (1) Upon request of a qualifying facility, each electric utility shall provide:

(i) Supplementary power;

(ii) Back-up power;

(iii) Maintenance power; and

(iv) Interruptible power.

(2) The State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and the Commission (with respect to any nonregulated electric utility) may waive any requirement of paragraph

(b)(1) of this section if, after notice in the area served by the electric utility and after opportunity for public comment, the electric utility demonstrates and the State regulatory authority or the Commission, as the case may be, finds that compliance with such requirement will:

(i) Impair the electric utility's ability to render adequate service to its customers; or

(ii) Place an undue burden on the electric utility.

(c) Rates for sales of back-up and maintenance power. The rate for sales of back-up power or maintenance power:

(1) Shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both; and

(2) Shall take into account the extent to which scheduled outages of the qualifying facilities can be usefully coordinated with scheduled outages of the utility's facilities.

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18 C.F.R. § 292.306 Interconnection costs.

(a) Obligation to pay. Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics.

(b) Reimbursement of interconnection costs. Each State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and nonregulated utility shall determine the manner for payments of interconnection costs, which may include reimbursement over a reasonable period of time.

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18 C.F.R. § 292.307 System emergencies.

(a) Qualifying facility obligation to provide power during system emergencies. A qualifying facility shall be required to provide energy or capacity to an electric utility during a system emergency only to the extent:

(1) Provided by agreement between such qualifying facility and electric utility; or

(2) Ordered under section 202(c) of the Federal Power Act.

(b) Discontinuance of purchases and sales during system emergencies. During any system emergency, an electric utility may discontinue:

(1) Purchases from a qualifying facility if such purchases would contribute to such emergency; and

(2) Sales to a qualifying facility, provided that such discontinuance is on a nondiscriminatory basis.

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18 C.F.R. § 292.308 Standards for operating reliability.

Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may establish reasonable

standards to ensure system safety and reliability of interconnected operations. Such standards may be recommended by any electric utility, any qualifying facility, or any other person. If any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility establishes such standards, it shall specify the need for such standards on the basis of system safety and reliability.

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18 C.F.R. § 385.207 Petitions (Rule 207).

(a) General rule. A person must file a petition when seeking:

(1) Relief under subpart I, J, or K of this part;

(2) A declaratory order or rule to terminate a controversy or remove uncertainty;

(3) Action on appeal from a staff action, other than a decision or ruling of a presiding officer, under Rule 1902;

(4) A rule of general applicability; or

(5) Any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.

(b) Declarations of intent under the Federal Power Act. For purposes of this part, a declaration of intent under section 23(b) of the Federal Power Act is treated as a petition for a declaratory order.

(c) Except as provided in § 381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in § 381.302(a).

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83 Ill. Adm. Code 445 (2004)

Title 83, Part 445 – Authority & General Source

AUTHORITY: Implementing Section 3.1 of the Local Solid Waste Disposal Act (Ill. Rev. Stat. 1989, ch. 85, par. 5903.1) and implementing Sections 8-403.1 and 9-215.1 of The Public Utilities Act and authorized by Section 10-101 of The Public Utilities Act (Ill. Rev. Stat. 1989, ch. 111 2/3, pars. 8-403.1, 9-215.1 and 10-101).

GENERAL SOURCE: Adopted at 14 Ill. Reg. 626, effective January 1, 1990; amended at 16 Ill. Reg. 2535, effective February 1, 1992.

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83 Ill. Adm. Code 445.10 (2004)

§ 445.10 Applicability.

This Part applies to each electric utility, as defined in Section 3-105 of The Public Utilities Act (Ill. Rev. Stat. 1987, ch. 111 2/3, par. 3-105).

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83 Ill. Adm. Code 445.20 (2004)

§ 445.20 Definitions.

"Act" means The Public Utilities Act (Ill. Rev. Stat. 1987, ch. 111 2/3, pars. 1-101 et seq.).

"Avoided Costs" means the incremental costs to the electric utility of electric energy which, but for the purchase from the qualified solid waste energy facility, the utility would generate itself or purchase from another source.

"Commission" means the Illinois Commerce Commission.

"Economic Losses" means an increase in the electric utility's revenue requirements as a result of electric energy purchases from a qualified solid waste energy facility that is not recovered either from tax credits pursuant to this Part or from ratepayers.

"Electric Energy" refers to both the energy and capacity purchased by an electric utility from a qualified solid waste energy facility.

"Fuel Loading" means the total fuel consumed at a qualified solid waste energy facility during the reported or projected period in terms of million Btus.

"Qualified Solid Waste Energy Facility" means a facility that meets the criteria set forth in 18 CFR 292 in effect on January 1, 1989 (hereinafter referred to as 18 CFR 292), and the Local Solid Waste Disposal Act (Ill. Rev. Stat. 1987, ch. 85, par. 5901 et seq.), hereinafter referred to as the "Local Solid Waste Disposal Act," or an electric generating facility which uses methane gas generated from landfills and meets such requirements of 18 CFR 292. No incorporation of 18 CFR 292 in this Part includes any later amendment or edition.

"Qualifying Facility" means a cogeneration facility or a small power production facility which meets the criteria for qualification set forth in 18 CFR 292, Subpart B.

"Solid Waste" means "waste," as defined in Section 3.53 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1003.53), which is in solid or semi-solid form, provided that "solid waste" does not include that portion of material that is intended or collected to be recycled.

"Solid Waste Throughput Volume" means the yearly design capacity of a qualified solid waste energy facility when only solid waste is consumed as fuel.

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83 Ill. Adm. Code 445.30 (2004)

§ 445.30 Availability of Benefits.

a) The benefits of this Part shall apply to any qualified solid waste energy facility. The owner(s) or operator of such a facility shall petition the Commission for a determination that the facility meets the requirements and criteria specified in the Act and this Part. These requirements include complying with the procedures for obtaining qualifying status set forth in 18 CFR 292 and with the Local Solid Waste Disposal Act.

b) In demonstrating compliance with 18 CFR 292, the owner(s) or operator of a facility must file with the Commission a copy of:

1) the notice filed with the Federal Energy Regulatory Commission pursuant to 18 CFR 292.207, or

2) certification as a qualifying facility issued by the Federal Energy Regulatory Commission or a successor agency.

c) In demonstrating compliance with the Local Solid Waste Disposal Act, the owner(s) or operator must file with the Commission evidence that a solid waste management plan or Solid Waste Energy Facility Plan provided for in Section 3.1 of the Local Solid Waste Disposal Act has been filed with and approved by the Illinois Environmental Protection Agency.

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83 Ill. Adm. Code 445.40 (2004)

§ 445.40 Terms and Conditions of Service.

a) The electric utility shall negotiate terms and conditions of service with the owner(s) or developer(s) of a qualified solid waste energy facility in accordance with the utility's standard terms and conditions of service for small power producers compiled pursuant to 83 Ill. Adm. Code 430.40.

b) Electric utilities shall be required to enter into long-term contracts to purchase electric energy from qualified solid waste energy facilities located in the electric utility's service area for a period beginning on the date the qualified solid waste energy facility begins generating electric energy, and continuing for a minimum of twenty years thereafter, including qualified solid waste energy facilities fueled by landfill-generated methane gas which are located at landfills owned by a forest preserve district or ten years in the case of qualified solid waste energy facilities fueled by landfill-generated methane gas which are not located at landfills owned by a forest preserve district.

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83 Ill Adm. Code 445.50 (2004)

§ 445.50 Reporting Requirements.

a) The owner(s) or operator of a qualified solid waste energy facility (excluding facilities fueled by methane gas generated from landfills) shall annually report to the Commission that the facility has met the requirements of the Illinois Environmental Protection Agency pursuant to the Local Solid Waste Disposal Act.

b) The owner(s) or operator of a qualified solid waste energy facility (excluding facilities fueled by methane gas generated from landfills) shall certify to the Commission, on an annual basis following the date of commercial operation of the facility, that solid waste is expected to comprise, at the minimum, 95 percent of the annual fuel loading for the following twelve months. In December of each year following the year of the facility's commercial operation date, the owner(s) or operator shall report the actual fuel loading for the twelve month period ending on November 30th of the same year. The use of natural gas, oil, or other fuels in connection with ignition, start-up, testing, flame stabilization and control, maintenance of minimum combustion temperatures, and during unanticipated outages of the solid waste sources shall not be included in any calculation of annual fuel loading.

c) The owner(s) or operator of a qualified solid waste energy facility (excluding facilities fueled by methane gas generated from landfills) shall certify to the Commission, on an annual basis following the date of commercial operation of the facility, that the solid waste throughput volume for the following twelve months shall, at a minimum, be 66 percent of the yearly design capacity of the facility. In December of each year following the year of the

facility's commercial operation date, the owner(s) or operator shall report the throughput volume for the twelve month period ending on November 30th of the same year.

d) The owner(s) or operator of a qualified solid waste energy facility shall notify the Commission and all electric utilities to which the facility sells electric energy within 30 days of the date of a decision by a court or agency of competent jurisdiction in which the facility loses its status under the Act or this Part. The notification shall state that the facility no longer qualifies, the reasons therefor, and the anticipated date when the facility shall again qualify under the Act or this Part.

e) Displacement reports

1) Each electric utility shall report to the Commission in December of each year an estimate of the amounts and types of fuels displaced pursuant to Section 8-403.1(g) of the Act. Each utility also shall report an estimate of additional costs it incurred to alter its economic dispatch procedures pursuant to Section 8-403.1(g) of the Act. These costs may include added fuel costs caused by deviating from economic dispatch, computer software costs to alter plant dispatching, monitoring and control costs, as well as any other costs incurred to comply with Section 8-403.1(g) of the Act.

2) In the event that an electric utility is constrained from displacement of fuels by existing technical, contractual or other circumstances, the utility shall report such circumstances and show why displacement is not practicable. The Commission will weigh the practicability of displacement against the general requirement of displacement pursuant to Section 8-403.1(g) of the Act. In case of a successful showing of cause for exemption from

displacement, the utility need not comply with the reporting requirements of subsection (e).

f) Each electric utility shall report to the Commission in December of each year any economic loss it incurred during the twelve month period ending on November 30th of the same year in complying with the requirements of Section 8-403.1 of the Act and this Part.

g) Within 60 days of the signing of a contract with a qualified solid waste energy facility, each electric utility shall report to the Commission the amounts of electric energy contracted for each year of the contract period.

h) Each electric utility shall list separately in its monthly reports of tax credits to the Commission and the Illinois Department of Revenue:

1) any reasonable and necessary costs incurred in displacing electric energy from qualifying facilities because of purchases made pursuant to Section 8-403.1 of the Act, and

2) its avoided total costs from electric energy purchases from qualified solid waste energy facilities and a breakdown of these costs into energy and capacity as defined by 83 Ill. Adm. Code 430.30.

i) Each utility shall provide to all qualified solid waste energy facilities from which the utility purchases electric energy the information submitted to the Commission under subsections (e), (f), (g), (h), and a detailed breakdown of costs described in Section 8-403.1(d)(ii) of the Act assigned to the qualified solid waste energy facility specified. A facility may file a petition with the Commission under Section 445.80 contesting the validity of the information.

j) In the event that a qualified solid waste facility fails to comply with the certification requirements of subsections (a), (b) or (c), or in the event that for an annual reporting period as referred in the above sections (b) and (c) the facility ceases to be in compliance with the qualifying requirements of this Part or Section 8-403.1 of the Act, provided that the owner(s) or operator of the facility makes efforts to remedy noncompliance, the facility shall have 90 days in which to cure its noncompliance. If at the end of the 90-day cure period the facility has failed to comply with the said requirements, the purchase rate provided in Section 445.60(b) shall be suspended until such time as the facility certifies that it has complied with this Part, which in the case of subsection (a) shall be at any time, and in the case of subsection (b) or (c) shall be for the latest 12 months of facility operation. If the facility continues to maintain its status as a qualifying facility, it shall receive during the suspension period the rate that the utility would have paid for purchases of electric energy from a qualifying facility pursuant to 83 Ill. Adm. Code 430.80.

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83 Ill. Adm. Code 445.60 (2004)

§ 445.60 Purchase Rates.

a) Within 60 days of the effective date of this Part, each electric utility shall file and at all times thereafter have on file with the Commission tariffs or riders applicable to purchases of electric energy generated from qualified solid waste energy facilities.

b) Each tariff or rider shall at a minimum include:

1) the billing period;

2) a reconciliation procedure; and

3) the methodology for determining purchase rates, including the methodology for determining the rate at which free service would have been billed had it not been provided free of charge. The purchase rate contained in tariffs and riders shall be equal to the average price of electricity per kilowatt-hour (excluding amounts paid for street lighting and pumping) paid for by a unit or units of local government to the electric utility during the latest twelve month period, including free service electricity, if any, at the rate that the unit or units of local government would have been billed had the electricity not been provided free of charge.

c) In the event that the purchase rate pursuant to Section 8-403.1(c) of the Act applicable to all electric energy purchased by a utility from qualified solid waste energy facilities is expected to result in monthly tax credits for a utility which will exceed its tax obligations under The Public Utilities Revenue Act (Ill. Rev. Stat. 1987, ch. 120, pars. 468 et seq.), qualified solid waste energy facilities shall be paid the purchase rate specified in Section 8-403.1(c) of the Act on a "first come, first served" basis determined from the date that the facility has obtained, and continues to hold, a valid development permit under Section 39 of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1039) and, for facilities other than those fueled by methane gas generated from landfills, a service agreement with a unit or units of local government. Notice of said approval shall be provided to the Commission. After all available tax credits are used, remaining electric energy purchases

from qualified solid waste energy facilities shall be paid at the elected rate under 83 Ill. Adm. Code 430.80, notwithstanding the contracted for purchase rate.

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83 Ill. Adm. Code 445.70 (2004)

§ 445.70 Tax Credits.

a) Calculation of monthly tax credit

1) Each utility shall calculate tax credits using the following formula to assure compliance with Section 8-403.1(d) of the Act.

C = P-(R-O)

where:

C = Public utility tax credit.

P = Actual total dollar amount paid for purchases from a qualified solid waste energy facility applying the price specified in Section 445.60(b).

R = The total amount that the utility would have paid a qualified solid waste energy facility pursuant to 83 Ill. Adm. Code 430.80.

O = Any amounts in the form of reasonable and necessary costs incurred by a utility in displacing electric energy from qualifying facilities because of purchases made pursuant to Section 8-403.1(c) of the Act. Such costs shall include those incremental costs of system operation reasonably incurred by a utility (excluding those resulting from Section 445.60 of this Part) as a direct result of having to purchase electric energy from qualified solid

waste energy facilities in lieu of purchasing equivalent amounts of electric energy from other qualifying facilities.

2) At the time the owner(s) or developer(s) of a qualified solid waste energy facility enters into a contract with an electric utility for the sale of electric energy to the electric utility, the owner(s) or developer(s) of a qualified solid waste energy facility may elect one of the methodologies specified in 83 Ill. Adm. Code 430.80. In the event of an impasse in negotiations between the utility and the facility, either party may request a determination of the issues by the Commission, based on the criteria in 83 Ill. Adm. Code 430.80

b) Reimbursement by qualified solid waste energy facility

1) The owner(s) or operator of a qualified solid waste energy facility shall file with the Commission and the Illinois Department of Revenue a proposed reimbursement schedule. The schedule shall be filed no later than one year prior to the start of the reimbursement period. The schedule shall state the anticipated annual repayments over the reimbursement period.

2) The starting date of reimbursement to the General Revenue Fund of tax credits accumulated for a qualified solid waste energy facility or an electric generating facility fueled by landfill generated methane gas located at a landfill owned by a forest preserve district shall not exceed twenty years from the date the facility begins commercial operation, after all operational and acceptance testing has been completed. For an electric generating facility fueled by methane gas generated from landfills, the starting date of reimbursement shall not exceed ten years from the date the facility begins commercial operation,

after all operational and acceptance testing has been completed.

3) The reimbursement payments of a qualified solid waste energy facility shall equal the sum of the tax credits accumulated under Section 8-403.1(d) of the Act.

4) All tax credits accumulated for a qualified solid waste energy facility shall be fully reimbursed by that facility to the General Revenue Fund by the end of the actual useful life of the facility.

5) In no event shall a utility be required to reimburse the General Revenue Fund for tax credits received under Section 8-403.1 of the Act or this Part.

c) Tax credit disputes

1) The Illinois Department of Revenue, the owner(s) or operator of any qualified solid waste energy facility, or the involved unit or units of local government may request a decision by the Commission concerning any costs relating to tax credits claimed by the utility, or any other tax credit dispute with a utility, in accordance with the Act or this Part.

2) Any petition by the Illinois Department of Revenue or a qualified solid waste energy facility requesting a decision pursuant to subsection (c)(1) shall comply with the Commission's Rules of Practice (83 Ill. Adm. Code 200).

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

RESOURCE TECHNOLOGY CORPORATION, Plaintiff, v. ILLINOIS COMMERCE COMMISSION. Defendants.	No. 02 CH 18158

COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF

Plaintiff Resource Technology Corporation complains against Defendant Illinois Commerce Commission as follows:

INTRODUCTION

1. Plaintiff brings this suit seeking a declaratory judgment that the Illinois Commerce Commission is preempted by federal law and therefore without authority to reconsider the certification by the Federal Energy Regulatory Commission ("FERC") of Plaintiff's landfill gas-to-energy conversion facility at the Livingston Landfill in Pontiac, Illinois ("Pontiac Facility") as a qualifying small power production facility ("QF") under the federal Public Utilities Regulatory Policies Act of 1978 ("PURPA"). 16 U.S.C. §§ 2601 *et seq.* In addition, Plaintiff seeks to enjoin Illinois Commerce Commission proceedings that

seek to reconsider FERC's certification of the Pontiac facility.

PARTIES

2. Plaintiff Resource Technology Corporation ("RTC") is engaged in the business of controlling gas pollution produced by landfills. In connection therewith, among other things, RTC converts the methane portion of landfill gas into electricity, which is then sold to public utilities or end users. RTC is currently in reorganization proceedings pursuant to Chapter 11 of the federal bankruptcy laws.

3. Defendant Illinois Commerce Commission ("ICC") is a commission created by the State of Illinois pursuant to the Illinois Public Utilities Act.

JURISDICTION AND VENUE

4. Plaintiff RTC brings this suit for declaratory relief under 735 ILCS 5/2-701 *et seq.* and for injunctive relief under 735 ILCS 5/11-101 *et seq.*

5. Venue is proper in the Circuit Court of Cook County, Illinois, pursuant to 735 ILCS 5/2-101.

FACTS

6. RTC's Pontiac Facility converts methane gas collected from the Livingston Landfill to electricity. RTC has invested approximately $41 million in its Pontiac Facility from inception of the project to date.

7. On July 1, 1996, RTC filed a petition with FERC pursuant to 18 C.F.R. § 292.207(a) to be designated as a

qualifying small power production facility ("QF") under the federal Public Utilities Regulatory Policies Act of 1978 ("PURPA"). 16 U.S.C. §§ 2601 *et seq.* FERC's acceptance of the filing certified that the Pontiac Facility was a QF. FERC assigned QF Docket Number 96-121-000 to the Pontiac Facility. A copy of the certification filed with FERC is attached hereto as Exhibit A. On June 10, 2002, the Pontiac facility was re-certified with FERC under the federal PURPA statute pursuant to 18 C.F.R. § 292.207(a)(iii). FERC assigned QF Docket Number 96-121-001 to the re-certified Pontiac Facility. A copy of the re-certification filed with FERC is attached hereto as Exhibit B. The FERC certifications identify "Landfill gas" as the "primary energy source" for the Pontiac Facility. *See* Exhibits A and B, ¶¶4D.

8. In an Order entered on October 8, 1997, in Docket No. 97-0034, the ICC determined that the Pontiac Facility met the requirements of a Qualified Solid Waste to Energy Facility ("QSWEF") under Section 8-403.1 of the Illinois Public Utilities Act. 220 ILCS 5/8-403.1. The ICC order is attached hereto as Exhibit C. A QSWEF is defined under Section 8-403.1 to mean a facility determined by the ICC to:

> (A) "use methane gas generated from landfills as its primary fuel," and
>
> (B) "possess characteristics that would enable it to qualify as a . . . small power production facility [or QF] under federal law."

220 ILCS 5/8-403.1. As a QSWEF, RTC is entitled to be paid a favorable purchase rate (commonly referred to as the "retail rate") by the local utility, Commonwealth Edison, for the electricity generated at the Pontiac Facility.

9. On July 9, 2002, the ICC Energy Division Staff completed a Report ("Staff Report") addressing the use of fossil fuel (specifically, natural gas) in addition to the use of landfill methane to generate electricity at the Pontiac Facility. A copy of the Staff Report is attached hereto as Exhibit D. RTC does not deny it has used fossil fuel at the Pontiac Facility along with landfill methane, and specifically disclosed the use of such fuel in the re-certification filed with FERC attached as Exhibit B.

10. The Staff Report questions whether because of the use of fossil fuel, the Pontiac Facility meets the qualifications of a QF under FERC regulations (*see* 18 C.F.R. § 292.204 attached as Exhibit E hereto), and hence continues to qualify as a QSWEF under the Illinois Public Utilities Act. The Staff Report seeks to impose a limitation on the use of fossil fuel despite the Pontiac Facility's certification under FERC regulations that specifically address the use of fossil fuel. The Staff Report concludes notwithstanding the FERC certifications, that "it does not follow that [the Pontiac facility] is entitled to unrestricted use of fossil fuels to generate electricity at the retail rate." *See* Exhibit D at page 2.

11. There can be no dispute and the ICC has not contended otherwise, that the certifications filed with FERC under the federal PURPA statute attached hereto as Exhibits A and B are in full force and effect. These FERC certifications conclusively establish both that the Pontiac Facility uses methane gas generated from the Livingston Landfill as its "primary fuel" and that it also "possess[es] characteristics that would enable it to qualify as a . . . small power production facility [or QF] under federal law" as required by the Illinois Public Utilities Act. *See* Exhibit C at page 5. Accordingly, the FERC certifications also

conclusively establish that the Pontiac Facility meets the qualifications of a QSWEF under the Illinois Public Utilities Act.

12. The Staff Report nonetheless seeks to go behind the certification as a QF under the federal PURPA statute and FERC regulations, contending that there is reason to believe that the Pontiac facility is not in compliance with QF regulations promulgated by FERC. *See* Exhibit D at page 3. FERC, however, has exclusive jurisdiction to determine whether the Pontiac Facility is in compliance with its QF regulations, including whether the use of fossil fuel (of which FERC has been made aware by RTC) is in violation of those FERC regulations.

13. By Order dated July 10, 2002, the ICC pursuant to the Staff Report initiated Proceeding Number 02-0461 to reconsider the QF status of the Pontiac Facility, claiming specifically that it "has jurisdiction over the subject matter" of the Report. *See* Exhibit F at page 3. The ICC, however, does not have jurisdiction to invade the exclusive federal jurisdiction of FERC under the federal PURPA statute to determine whether the Pontiac Facility is a QF.

REQUEST FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

14. The Court has jurisdiction to declare the rights and legal obligations of interested parties seeking such relief under 735 ILCS 5/2-701, and also has jurisdiction to enjoin ICC Proceeding Number 02-0461 under 735 ILCS 5/11-101 *et seq*.

15. There exists a genuine dispute between RTC and the ICC over whether the ICC may in Proceeding Number

02-0461 invade the exclusive jurisdiction of the FERC by reconsidering whether the Pontiac Facility is in compliance with QF regulations promulgated by FERC, when the Pontiac Facility is, in fact, currently certified as a QF under the federal PURPA statute pursuant to 18 C.F.R. § 292.207.

16. Without an immediate resolution of this dispute, RTC may be improperly deprived of the benefits of its certification under the FERC QF regulations, which will result in a loss of millions of dollars of revenue to the detriment of RTC and its creditors in the Chapter 11 proceedings.

17. Exhaustion of administrative remedies within the ICC would be futile because the ICC is acting without authority by invading the exclusive jurisdiction of FERC to reconsider the QF status of the Pontiac Facility.

WHEREFORE, Plaintiff Resource Technology Corporation respectfully requests that the Court enter judgment (1) declaring that Defendant Illinois Commerce Commission is without jurisdiction to reconsider whether the Pontiac facility is a QF under FERC regulations and hence qualifies as a QSWEF under the Illinois Public Utilities Act, (2) enjoining any further proceedings in ICC Proceeding Number 02-0461, and (3) for such other and further relief as is just and proper.

Respectfully submitted,

RESOURCE TECHNOLOGY CORPORATION

By: /s/ Phil Curley
One of Its Attorneys

C. Philip Curley
Susan Valentine
ROBINSON CURLEY & CLAYTON, P.C.
Firm Number 15479
300 South Wacker Drive, Suite 1700
Chicago, Illinois 60606
Telephone: (312) 663-3100
Facsimile: (312) 663-0303
Attorney No. 15479

Dated: October 4, 2002.

EXHIBIT A

QF 96-121-000

Resource Technology Corporation
330 South Wells Street Suite 711
Chicago, Illinois 60606
(312) 341-4043
Fax: (312) 341-9596

July 1, 1996

Ms. Lois D. Cashell, Secretary
Federal Energy Regulatory Commission
888 First Street N E
Washington, D. C. 20426

Dear Ms. Cashell:

I am enclosing our application for self-certification under FERC Commission Regulation No.292-207(a) for our site located at American Disposal Services, Inc. Landfill, Pontiac, IL We own no other facilities within one mile of the facility for which this application is enclosed.

Please let me know if you need any further information.

Very truly yours,

Resource Technology Corporation

By: /s/ George B. Calvert
George B. Calvert, President

Resource Technology Corporation
330 South Wells Street Suite 711
Chicago, Illinois 60606
Tel: (312) 341-4043
Fax: (312) 341 9596

JUNE 30, 1996

FERC Form No. 556
OMB No. 1902-0075
Expires _____

REPORT OF SELF-CERTIFICATION OF QUALIFYING FACILITY STATUS AS A SMALL POWER PRODUCTION FACILITY

PART A
GENERAL INFORMATION TO BE SUBMITTED BY ALL APPLICANTS (ITEMS 1-6)

1A.	Full name of applicant:	Resource Technology Corporation
1B.	Full address of applicant:	330 South Wells St., Suite 711 Chicago, IL 60606
1C.	Owner of the facility:	Resource Technology Corporation

100% owned by individual owners and closely held corporations

Ownership by electric utility or electric utility holding company: None

Operator of facility: Resource Technology Corporation

1D. Signature of authorized individual evidencing accuracy of information provided by applicant: /s/ George B. Calvert
George B. Calvert
President

2. Person to whom communications regarding the applicant may be addressed:

Name: George B. Calvert
Title: President
Telephone number: (312) 341-4043
Mailing address: 330 S. Wells Street, Suite 711
Chicago, IL 60606

3A. Location of facility to be self-certified:

American Disposal Services, Inc. Landfill, Pontiac, IL

3B. Electric utility which will purchase power: Commonwealth Edison Co.

4A. Principal components:

Generator sets manufactured by Caterpillar Engine Co., producing approximately 4 megawatts per hour from landfill gas only.

4B. The maximum gross electric power production capacity of the facility on a stand alone basis is 4,000 kw per hour based on actual capacity of the generators at the site.

The net maximum electric power to production capacity is reduced by a parasitic load of 8%, which is used to operate auxiliary equipment necessary for power generation.

4D. Primary energy source: Landfill gas

5. Use of fossil fuel – percentage of total energy input:

A. Natural gas – 0%
B. Oil – 0%
C. Coal – 0%
D. Other – 0%
(Landfill gas 100%)

PART B
DESCRIPTION OF SMALL POWER PRODUCTION FACILITY

7. No fossil fuel will be used

8. No other facilities owned within one mile of this facility.

EXHIBIT B

Resource Technology Corporation
330 S. Wells Street – Suite 711
Chicago, Illinois 60606
Tel: (312) 341-4059
Fax: (312) 341-9596

June 10, 2002

Ms. Lois D. Cashell, Secretary
Federal Energy Regulatory Commission
888 First Street N E (Filed Jun 17, 2002)
Washington, D.C. 20426

Dear Ms. Cashell:

I am enclosing our application for re-self certification under FERC Commission Regulation No.292-207(a) for our site located at American Disposal Services, Inc. Landfill, Pontiac, Illinois (QF No.96-121-000). We own no other facilities within one mile of the facility for which this application is enclosed.

Yours truly,

/s/ John E. Connolly
John E. Connolly
President

Resource Technology Corporation
330 South Wells Street, Suite 711
Chicago, Illinois 60606
312-341-4059 – Telephone
312-341-9596 – Fax

June 10, 2002

FERC Form No. 556
OMB No. 1902-0075

REPORT OF RE-SELF CERTIFICATION OF QUALIFYING FACILITY STATUS AS A SMALL POWER PRODUCTION FACILITY (QF 96-121-000)

PART A
GENERAL INFORMATION TO BE SUBMITTED BY ALL APPLICANTS
(ITEMS 1-6)

1A.	Full name of applicant:	Resource Technology Corporation
1B.	Full address of applicant:	330 South Wells St., Suite 711 Chicago, IL 60606
1C.	Owner of the facility:	Resource Technology Corporation
	100% owned by individual owners and closely held corporation	
	Ownership by electric utility or electric utility holding company:	None
	Operator of facility:	Resource Technology Corporation
1D.	Signature of authorized individual evidencing accuracy of information provided by applicant:	/s/ John E. Connolly John E. Connolly President

2. Person to whom communications regarding the applicant may be addressed:

Name:	John E. Connolly
Title:	President
Telephone number:	(312) 341-4059
Mailing address:	330 S. Wells Street, Suite 711 Chicago, IL 60606

3A. Location of facility to be self certified:

American Disposal Services, Inc. Landfill, Pontiac, IL

3B. Electric utility which will purchase power: Commonwealth Edison Co.

4A. Principal components:

Generator sets manufactured by Solar Turbines, Inc. – a wholly owned division of Caterpillar, Inc. producing approximately 35 megawatts.

4B. The maximum gross electric power production capacity of the facility on a stand alone basis is 35,000 kilowatts based on actual capacity of the generators at the site.

The net maximum electric power to production capacity is reduced by a parasitic load of 20%, which is used to operate auxiliary equipment necessary for power generation.

4D. Primary energy source: Landfill gas

5. Use of fossil fuel – percentage of total energy input:

D. Other
(Biomass – 100%)

PART B
DESCRIPTION OF SMALL
POWER PRODUCTION FACILITY

7. Fossil fuel will be used – pursuant to 292.204(b)

8. No other facilities owned within one mile of this facility.

EXHIBIT C

STATE OF ILLINOIS

[SEAL]

ILLINOIS COMMERCE COMMISSION

October 10, 1997

Re: 97-0031, 97-0032, 97-0033
97-0034, 97-0035, 97-0036,
97-0037, 97-0038, 97-0039,
97-0040, 97-0041, 97-0042,
97-0043, 97-0044, 97-0045

Dear Sir/Madam:

Enclosed is a certified copy of the Order entered by this Commission.

Sincerely,

/s/ Donna M. Caton
Donna M. Caton
Chief Clerk

Enc.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at site known as the Bi-State Landfill, 2248 Parks Road, Belleville, IL 62220, is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act	97-0031
Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the McLean Co. Landfill, R.R. 3 Box 142, Bloomington, IL is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0032
Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Beecher Landfill 1055 W. Goodenow Road, Beecher, Illinois is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0033

Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Livingston, landfill, 14732 East 2100 North Road, Pontiac IL 61764 is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0034
Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the American Grading/Lyons Landfill, 1st Avenue & I-55, McCook IL is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0035
Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Kewanee Landfill, on Route 8, Kewanee, IL 61443 is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0036

Resource Technology Corporation (RTC) Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Prairie Preservation Properties Landfill, 170th Street Lansing, IL 60433 is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utility Act.	97-0037
Resource Technology Corporation (RTC) Petition for determination that an electric generating facility fueled by landfill-generated methane at a site know as the Litchfield landfill, East Route 16, Litchfield, IL 62506 is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0038
Resource Technology Corporation (RTC) Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Congress-Hillside landfill, 4100 West Frontage Road, Hillside, IL 60160 is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0039

Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site, known as the Sangmon Landfill, RR #9, Sand Hill Road, Springfield, IL 62702 is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0040
Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Peoria Landfill, RR # 2, Brimfield, IL 61517 is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0041
Resource Technology Corporation (RTC)	
Petition for a determination than an electric generating facility fueled by landfill-generated methane at a site known as the Viola landfill, Greene Township, Mercer County, IL is a qualified solid waste to energy facility as defined in Section 8-403.1 of Illinois Public Utilities Act.	97-0042

Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Thomas 12th Street Disposal landfill, rural Danville, IL is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0043
Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Taylor Ridge Landfill, 8400 77th St West, Taylor Ridge, IL 61232 is a qualified solid waste to energy facility as defined in Section 8-403.1 of Illinois Public Utilities Act.	97-0044
Resource Technology Corporation (RTC)	
Petition for a determination that an electric generating facility fueled by landfill-generated methane at a site known as the Paxton landfill, 12201 South Oglesby Avenue, Chicago, IL 60633 is a qualified solid waste to energy facility as defined in Section 8-403.1 of the Illinois Public Utilities Act.	97-0045 (Consolidated)

ORDER

By the Commission:

On January 9, 1997, Resource Technology Corporation ("RTC") filed verified petitions seeking Illinois Commerce Commission ("Commission") determinations that fifteen proposed electric generating facilities fueled by landfill methane and iodated at various locations throughout the State of Illinois, respectively docketed as Nos. 97-0031 through 97-0045, will be solid waste energy facilities as defined in Section 8-403.1(b) of the Illinois Public Utilities Act ("Act") and qualify for a contract with a utility pursuant to Section 8-403.1(e) of the Act.

Pursuant to notice as required by law and the rules and regulations of the Commission, these matters came on for hearing before a duly authorized Hearing Examiner at the offices of the Commission in Chicago, Illinois, on February 7, 1997. RTC appeared by its President, George B. Calvert, who also testified in these proceedings. The Staff of the Commission appeared through the Office of General Counsel. Subsequent hearings, both on a consolidated and non-consolidated basis, were held on May 22, June 18, and July 7, 1997. The Hearing Examiner has consolidated these dockets for ordering purposes. At the conclusion of the July 7, 1997 hearing, the record was marked "Heard and Taken."

Section 8-403.1 of the Act provides that a qualified solid waste energy facility fueled by landfill methane may be entitled to sell electricity to an electric utility at a rate equal to the average rate paid to the utility per kilowatt hour for electricity purchased by the unit of local government in which the qualified solid waste energy facility is located. Section 8-403.1(b) defines a "qualified solid waste

energy facility" as a facility which the Commission determines (a) qualifies as a qualified solid waste energy facility under the Local Solid Waste Disposal Act; (b) uses methane gas generated from landfill gas as its primary fuel; and (c) possesses characteristics which would enable it to qualify as a cogeneration or small power production facility under the Public Utility Regulatory Policies Act of 1978 ("PURPA").

The Local Solid Waste Disposal Act defines a qualified solid waste energy facility as either (a) "a solid waste pollution control facility" or (b) "a facility which uses methane generated from landfills". 415 ILCS §101 *et seq.*

Summary of Evidence

The evidence shows that RTC is a Delaware corporation. RTC will own and operate the proposed small power production facilities fueled by methane to be located at various sites in Illinois. Mr. Calvert testified that he is responsible for the development and construction of the generating facilities and they will be qualifying facilities under PURPA. He stated that notices of self-certification and self-recertification describing the facilities were pled with the Federal Energy Regulatory Commission ("FERC") in connection with the facility, as provided in the FERC's regulations (18 C.F.R. sec. 292.207). Copies of these filings were admitted in evidence. All the facilities have a 20 year useful life. RTC provided proofs that each county in which a proposed facility is to be located has a solid waste energy plan approved by the Illinois Environmental Protection Agency ("EPA"). The Commission, therefore, concludes that RTC has met the requirements of Section 8-403.1(b) of the Act and finds them to be QSWEFs.

The evidence regarding the proposed landfills may be summarized in the following manner. The Docket 97-0031 landfill, located at 2248 Parks Road, Belleville, Illinois will have a capacity of 2 megawatts ("MW"), with a commercial operation data projected to be in the 2nd quarter of 1998. The facility is located in Illinois Power Company's ("IP's") service territory.

The Docket 97-0032 landfill, located at Rural Route 3, Bloomington, Illinois, will have a capacity of 2 MW, with a projected commercial operation date in the 2d quarter of 1998, The facility is located in Central Illinois Light Company's ("CILCO's") service territory.

The Docket 97-0033 landfill, located at 1055 W. Goodenow Road, Beecher, Illinois, will have a capacity of 6 MW, with a projected commercial operation date in the 4th quarter of 1997. The facility is located in Commonwealth Edison Company's ("ComEd's") service territory.

The Docket 97-0034 landfill, located at 14732 East 2100 North Road, Pontiac, Illinois, will have a capacity of 10 MW, with a projected commercial operation date in the 1st quarter of 1998. The facility is located in ComEd's service territory.

The Docket 97-0035 landfill, located at 1st Avenue and I-55, McCook, Illinois, will have a capacity of 5 MW, with a projected commercial operation date in the 3d quarter of 1997. The facility is located in ComEd's service territory.

The Docket 97-0036 landfill, located at Route 8, Kewanee, Illinois, will have a capacity of 3 MW, with a projected commercial operation date in the 4th quarter of 1997. The facility is located in IP's service territory.

The Docket 97-0037 landfill, located on 170th Street, Lansing, Illinois, will have a capacity of 3 MW, with a projected commercial operation date in the 3d quarter of 1997. The facility is located in ComEd's service territory.

The Docket 97-0038 landfill, located at East Route 16, Litchfiled, Illinois, will have a capacity of 3 MW, with a projected commercial operation date in the 1st quarter of 1998. The facility is located in CILCO's service territory.

The Docket 97-0039 landfill, located at 4100 West Frontage Road, Hillside, Illinois, will have a capacity of 10 MW, with a projected commercial operation date in the 1st quarter of 1998. The facility is located in ComEd's service territory.

The Docket 97-0040 landfill, located at Rural Route 9, Sand Hill Road, Springfield, Illinois, will have a capacity of 3 MW, with a projected commercial operation date in the 2d quarter of 1998. The facility will be located in CILCO's service territory.

The Docket 97-0041 landfill, located at Rural Route 2, Brimfield, Illinois, will have a capacity of 4 MW, with a projected commercial operation date in the 3d quarter of 1997. The facility is located in CILCO's service territory.

The Docket 97-0042 landfill, known as the Viola landfill, Greene Township, Mercer, County, Illinois, will have a capacity of 2 MW, with a projected commercial operation date in the 2d quarter of 1998. The facility will be located in IP's service territory.

The Docket 97-0043 landfill, known as the Thomas 12th street Disposal, rural Danville, Illinois, will have a capacity of 2 MW, with a projected commercial operation date in the 2d quarter of 1998. The facility is located in

MidAmerican Energy Company's ("MidAmerican") service territory.

The Docket 97-0044 landfill, located at 8400 77th Street West, Taylor Ridge, Illinois, will have a capacity of 5 MW, with a projected commercial operation date in the 4th quarter of 1998. The facility is located In Mid-American's service territory.

The Docket 97-0045 landfill, located at 12201 South Oglesby Avenue, Chicago, Illinois, with a capacity of 5 MW, with a projected commercial operation date in the 3d quarter of 1998. The facility is located in ComEd's service territory.

Subsection 8-403.1(e). The next step in the Commission's analysis is to determine whether the Commission is precluded from requiring the various electric utilities hereinbefore noted to enter into Section 8-403.1 contracts with RTC's proposed landfill generation facilities. Section 8-403.1(e) provides:

> The Illinois Commerce Commission shall not require an electric utility to purchase electricity from any qualified solid waste energy facility which is owned or operated by an entity that is primarily engaged in the business of producing or selling electricity, gas, or useful thermal energy from a source other than one or more qualified solid waste energy facilities.

Staff believes the Commission must determine the identity of the owner of the proposed facilities, and whether the owner is "primarily engaged" in generating energy from QSWEFs or from other energy producing sources. Staff asserts that a 50 percent measure similar to that applied by the FERC be used as the standard by

which to determine ownership. The FERC measure is found in 18 CFR 292.206. Staff noted that Section 8-403.1(e) is patterned on the CFR provision.

The Commission finds the FERC measure of "ownership" to be appropriate for Section 8-403.1(e). In this case, however, there is no question as to the identity of the owner of the proposed generation facilities. RTC owns 100 per cent of each facility.

The next step is to determine whether RTC is "primarily engaged in the business of producing or selling electricity, gas, or useful thermal energy from a source other than one or more qualified solid waste energy facilities." Staff states that there are two parts to this analysis: determining the identity of QSWEFs, and measuring RTC's involvement with QSWEFs and other sources of energy generation.

The Commission is of the opinion that QSWEFs can be facilities located only in Illinois. This interpretation is based on the language in Section 8-403.1 in conjunction with other statutory provisions related to the Retail Rate Law (415 ILCS 10/1 et. Seq.; 415 ILCS 5/1 et. Seq.; 35 ILCS 620/1 et.seq.). The Commission agrees that QSWEFs are intended to be limited to landfill methane gas generating facilities developed in Illinois. Since a QSWEF is eligible for a contract with the utility in whose territory it is located, and the Commission can order contracts only with Illinois utilities, a QSWEF perforce must be located in Illinois. No facility located outside of Illinois can qualify for such treatment; no facility outside of Illinois can be a QSWEF.

Regarding the measure of "primarily engaged", the Commission has determined that the employment of the

maximum gross power production capacity ("PPC") of a petitioner's electricity generation facilities. (RTC owns no gas producing facilities, so no comparable measure for gas was suggested.) The PPC is explicitly defined and measurable. It is information that is required on FERC Form 556 for federal Qualified Facility designation, and so is information that is readily available. It has the advantage over actual output generated as a standard because it is not likely to vary over time, and it does not vary due to factors such as plant maintenance or breakdown or to availability of methane gas (decomposition of waste in the landfill). Staff notes that the Commission adopted a similar standard in Docket Nos. 90-0195, 96-0354/96-0378, consol. The determination of whether a petitioner is primarily engaged in generation from non-QSWEFs would be made through a comparison of the total PC of QSWEFs and total PPC of non-QSWEFs owned or operated by that petitioner. The Commission believes the standard proposed by Staff is reasonable and should be adopted.

Employing this standard, the record shows that the facilities, which RTC has proposed for QSWEF status have a PPC total of 65 MW. The Commission finds that RTC is primarily engaged in producing energy from QSWEFs, and is eligible for the contract

Reporting Requirement. However, as Staff pointed out, the record shows that RTC intends to continue to develop non-QSWEF energy producing facilities. The record further shows that RTC believes its non-QSWEF business will be larger than its QSWEF business within five years.

It is clear that the Section 8-403.1 criteria must be met and maintained throughout the term of the contract.

Failure to do so results in the suspension of the right to collect the retail rate. 83 Ill. Admin. Code 445.50(j). By its intent to continue to develop non-QSWEF facilities, RTC has raised the strong probability that it will no longer be "primarily engaged" in producing energy from QSWEFs in the near future.

To address this situation, Staff has requested that RTC should be required to submit a bi-annual report to the Commission that details the development of all energy producing facilities owned or operated by RTC. The purpose of the report is to provide the Commission with sufficient and timely information needed to effectively address enforcement issues arising from this particular situation.

Staff suggested that the report should provide the following information:

1. the number of commercial facilities in commercial operation.
2. the number of facilities in development.
3. the stage of development of each facility.
4. the location of all energy producing facilities owned and/or operated by RTC.
5. a list of all entities having an equity interest in the facility, in order to determine ownership as defined by FERC's its ownership test found in 18 CFR 292.206(b).
6. the maximum gross power production capacity (PPC) of each electric generation facility, and the production or sales capacity of any gas company, owned or operated by RTC, in order to determine if RTC qualifies as being primarily engaged in

> the in the [sic] business of producing or selling electricity, gas, or useful thermal energy from a source other than one or more qualified solid waste energy facility.

The Commission finds the Staffs request for these reports to be reasonable and necessary under the circumstances presented in these Dockets.

Reimbursement issues. Staff also requested that RTC provide an annual report detailing the state of the reimbursement fund and its progress toward paying off its capital costs or indebtedness incurred in developing the facilities. The purpose of the report is to facilitate the Commission's enforcement authority under Section 8-403.1(d) of the Act. The Commission finds the report to be appropriate and necessary to aid in the execution of the Commission's statutory authority to direct the reimbursement of the Public Utility Fund ("Fund"). Since RTC has represented that it will voluntarily create a fund for the express purpose of reimbursing the Fund, the Commission need not consider whether it should direct that such a fund be instituted.

The record indicates that reimbursements would begin in 2007, and be completed in 2017. As noted, RTC has represented that it will create a reimbursement fund to meet these obligations.

COMMISSION FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Resource Technology Corporation, a Delaware corporation, owns generating facilities fueled by landfill methane near Westchester and Des Plaines, in Cook County, Illinois and at various other locations in Illinois;

(2) the Commission has jurisdiction over RTC and over the subject matter herein;

(3) on January 9, 1997, RTC filed fifteen verified petitions requesting that the Commission determine that its proposed landfill methane gas fueled electric generating facilities located throughout Illinois will be qualified solid waste energy facilities pursuant to Section 8-403.1 of the Public Utilities Act;

(4) the evidence indicates that the electric generating facilities will be configured to have a maximum gross generating capacity of approximately 65 MWs, they will be owned and operated by RTC; the facilities will use methane generated from the landfill and possess characteristics which enable them to qualify as a small power production facilities under PURPA;

(5) under the facts set forth in Finding (4), the facilities as configured in the petition, will be qualified solid waste energy facilities pursuant to Section 8-403.1*(b)* the Act;

(6) RTC is primarily engaged in the business of producing electricity from QSWEFs;

(7) RTC should file the bi-annual reports recommended by Staff regarding its energy producing facilities and annual reports regarding reimbursements as set forth In the prefatory portions of this Order.

IT IS THEREFORE ORDERED that the electric generating facilities as configured with a total gross generating capacity of 65 megawatts located in fifteen Illinois locations, which will be owned by Resource Technology Corporation and fueled by landfill methane and which will be located at the aforementioned landfills are determined to be qualified solid waste energy facilities pursuant to Section 8-403.1(b) of the Public Utilities Act.

IT IS FURTHER ORDERED that the various electric utilities set forth in the prefatory portion of this Order shall enter into contracts to purchase electric energy from these electric generating facilities for a period beginning on the date the facility begins generating electric energy and continuing for ten years thereafter.

IT IS FURTHER ORDERED that Resource Technology Corporation shall fully comply with Finding (7) of this Order, as well as with the provisions of 83 Ill. Admin. Code 445.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 8th day of October, 1997.

(SIGNED) DAN MILLER

Chairman

(SEAL)

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CERTIFICATE

Re: 97-0031, 97-0032, 97-0033,
97-0034, 97-0035, 97-0036,
97-0037, 97-0038, 97-0039,
97-0040, 97-0041, 97-0042,
97-0043, 97-0044, 97-0045

I, DONNA M. CATON, do hereby certify that I am Chief clerk of the Illinois Commerce Commission of the State of Illinois and keeper of the records and seal of said Commission with respect to all matters except those governed by chapters 18a and 18c of The Illinois Vehicle Code.

I further certify that the above and foregoing is a true, correct and complete copy of the order made and entered of record by said Commission on October 8, 1997.

Given under my hand and seal of said Illinois Commerce Commission at Springfield, Illinois, on October 10, 1997.

/s/ Donna M. Caton
Chief Clerk

EXHIBIT D

STAFF REPORT
ENERGY DIVISION
July 9, 2002

SUBJECT: Resource Technology Corporation operation of Pontiac Qualified Solid Waste Energy Facility

Summary and Recommendation:

In an order entered on October 8, 1997 in Docket No. 97-0034, the Commission determined that the facility located in Pontiac, Illinois and owned and operated by Resource Technology Corporation ("RTC") met the requirements to be a Qualified Solid Waste to Energy Facility ("QSWEF").[1] The Commission's Order finds that the Pontiac facility "will have a capacity of 10MW." (Order p. 6) Without subsequent Commission review or approval, RTC has expanded its generation capacity at the Pontiac facility to approximately 30 MW, well in excess of the amount authorized in the Commission's Order. Staff has strong reason to believe that at least one of the new generating units is fueled primarily (if not entirely) by combustion of natural gas, as purchased via a customer account commenced with Nicor Gas in 2001. Moreover, Staff has strong reason to believe that RTC Pontiac has sold electricity that is both in excess of the amount authorized by the Commission and that is fueled by natural gas to the local utility for the retail rate, as defined in Section 8-403.1(c) of the Public Utilities Act ("PUA"). Staff believes that the sale of

[1] Commission determination of QSWEF status is pursuant to Section 8-403.1 of the Public utilities Act (PUA), and is administered through the Commission's rules in Part 445 of the 83 Illinois Administrative Code.

electricity fueled by natural gas combustion took place between December 2001 and May 2002. In addition, it is possible that the sale of electricity fueled by natural gas at the Pontiac site continues today, but at levels below the 10 MW granted in the Order. The retail rate is intended to be applicable to electricity generated by QSWEFs whose primary fuel is landfill methane gas; selling at the retail rate electricity fueled by natural gas combustion violates 8-403.1(c) of the PUA. Based upon these concerns, Staff recommends that the Commission investigate RTC Pontiac for the purposes of determining whether RTC is in compliance with the Order in 97-0034, and whether RTC is in violation of any other applicable provisions of Section 8-403.1 of the PUA.

RTC Pontiac's Electrical Output:

RTC Pontiac was determined to be a QSWEF for 10 MW of capacity in Docket No. 97-0034. Staff has verified that RTC has installed one Solar[2] Titan Turbine and three Solar Taurus Turbines at the Pontiac site since December 2001. (Illinois Environmental Protection Agency Joint Construction and Operating Permit, Issued May 13, 2002) The total amount of generating capacity of the four Solar turbines is approximately 30 MW.

In December 2001, Network Electric, the contractor for RTC's Pontiac Site, commenced service as a natural gas customer with Nicor at the Pontiac site. Network Electric

[2] Solar Turbines is a subsidiary of Caterpillar, Inc., that specializes in gas turbine generator systems. Solar Turbines run on fossil fuel and landfill methane, and the company name should not be confused with renewable solar power.

is classified as a large volume gas transportation customer on Nicor's system.

After reviewing monthly billings provided by Nicor, Staff believes that the Pontiac site is using natural gas to power at least one of the electric generating units owned by RTC. The Solar Titan Turbine is rated at about 13 MW.

Using the monthly gas bills received from Nicor and the Solar Turbine's heat rate conversion factor, Staff believes that RTC Pontiac may have generated a substantial amount, in some months over 50% and in more recent months over 60%, of its electrical output from December 2001 through May 2002 through the use of natural gas as its primary fuel source.

Staff recognizes that there are parasitic loads at QSWEF sites, but the volumes of gas consumed at the RTC Pontiac site and the fact that the electrical output of the facility has increased by dramatic proportions give cause for serious concern. In January 2001, RTC Pontiac sold 63,931 kWhs to ComEd. In January 2002, this amount increased to 11,955,492 kWhs. In February 2001, RTC Pontiac sold 439,354 kWhs to ComEd. In February 2002, this amount increased to 14,353,884 kWhs. (ComEd's Year End 2001 report of Purchases from QSWEFs, March 25, 2002) The Pontiac site is certified for 10 MW of generation: if the generator(s) ran at 10 MW for 24 hours, seven days per week for an entire 30 day month, then the maximum electrical output that RTC Pontiac could sell to ComEd is 7,200,000 kWhs. From a review of the actual amounts that RTC Pontiac has sold to ComEd in 2001, it appears that RTC Pontiac's maximum monthly output sold to ComEd was 6,101,114 kWhs in November 2001. (ComEd's Year End 2001 report of Purchases from QSWEFs, March 25,

2002) From a review of the actual amounts that RTC Pontiac sold to ComEd in 2002, it appears that RTC's minimum output sold to ComEd was 10,942,308 kWhs in April 2002, and the maximum output sold to ComEd was 14,353,884 kWhs in February 2002. (ComEd's Report of Purchases from QSWEFs, June 7, 2002)

RTC Pontiac's Primary Fuel Source for the Generation of Electricity:

Energy Policy is concerned that RTC Pontiac may be in violation of Section 8-403.1 of the PUA. Section 8-403.1(b) of the Act refers to a QSWEF as a facility "determined by the Illinois Commerce Commission . . . to use landfill methane as its ***primary*** fuel . . . " (emphasis added.) Section 8-403.1(c) sets forth that an electric utility shall contract to purchase electricity from QSWEFs fueled by landfill generated methane (10 years for a regular landfill and 20 years for one owned by a forest preserve district.)

Although Section 8-403.1(b) of the PUA refers to landfill methane as the QSWEF's primary fuel source, it does not follow that the QSWEF is entitled to unrestricted use of fossil fuels to generate electricity to sell at the retail rate. Furthermore, FERC regulations place restrictions on the use of oil, natural gas, and coal by a Qualifying Facility (QF) to very specific purposes, e.g., Section 292.204(b)(2) of FERC's regulations governing QFs sets forth that:

> Use of oil, natural gas, and coal by a facility, under section 3(17)(B) of the federal Power Act is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly

> affecting the public health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electricity.

Deviation from the use of natural gas for the specific purposes set forth in FERC's regulations would result in the facility's non-compliance with FERC's QF requirements. Moreover, in order for a facility to be granted and maintain QSWEF status under Illinois law, it must achieve and maintain its status as a QF under federal law and FERC rules. Deviation from the use of natural gas for the specific purposes set forth in FERC's regulations would result in the facility's non-compliance with Section 8-403.1(b) of the PUA. Staff has strong reason to believe that at least one of the Solar Turbines at the Pontiac facility is fueled exclusively by natural gas. Given the amounts of natural gas consumed from December 2001-May 2002, it would appear that the Pontiac facility is using natural gas to generate electricity to sell at the retail rate. Staff believes this violates the requirements of Section 8-403.1.

Delinquent reports

In addition to the above concerns, RTC has failed to file reports required by the order in which the Commission made the determination that the subject facilities qualified for QSWEF status. The order in Dockets 97-0031 to 97-0045 consolidated requires RTC to file bi-annual

reports detailing the development of all energy producing facilities owned or operated by RTC and to file a report annually detailing the state of the reimbursement fund and its progress toward paying off its capital costs of indebtedness incurred in developing the facilities. As of the date of this report, RTC has failed to comply with the filing requirements of that order.

Respectfully submitted this 9th day of July, 2002.

David A. Borden
Energy Division

EXHIBIT E

18 C.F.R. § 292.204 Criteria for qualifying small power production facilities.

(a) Size of the facility. – (1) Maximum size. There is no size limitation for an eligible solar, wind, waste or facility, as defined by section 3(17)(E) of the Federal Power Act, For a non-eligible facility, the power production capacity for which qualification is sought, together with the power production capacity of any other non-eligible small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) Method of calculation. (i) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and, for hydroelectric facilities, if

they use water from the same impoundment for power generation.

(ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of a facility.

(3) Waiver. The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(b) Fuel use. (1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

(ii) Any primary energy source which, on the basis of its energy content, is 50 percent or more biomass shall be considered biomass.

(2) Use of oil, natural gas and coal by a facility, under section 3(17)(B) of the Federal Power Act, is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy.

EXHIBIT F

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
-vs-	)	
Resource Technology Corporation	)	02-0461
Citation to show cause for continued	)	
QSWEF Certification of Pontiac	)	
facility and to investigate compliance	)	
with the final order in Dockets 97-0031	)	
through 97-0045 Consolidated	)	

ORDER

By the Commission:

In an Order entered on October 8, 1997 in Dockets 97-0031 through 97-0045 consolidated ("Final Order"), the Illinois Commerce Commission ("Commission") determined that a facility located at 14732 East 2100 North Road, Pontiac, Illinois ("Pontiac facility") and operated by Resource Technology Corporation ("RTC") was a qualified solid waste energy facility ("QSWEF"). This facility was the subject of a petition for determination of QSWEF status in Docket 97-0034. Section 8-403.1(b) of the Public Utilities Act ("Act") defines a qualified solid waste energy facility in the following manner:

> For the purpose of this Section and Section 9-215.1, "qualified solid waste energy facility" means a facility determined by the Illinois Commerce Commission to qualify as such under the Local Solid Waste Disposal Act, to use methane gas generated from landfills as its primary fuel . . .

The Final Order making the determination that the Pontiac facility was a QSWEF stated that the facility would have a generating capacity of 10 MW.

The Final Order states that "It is clear that the Section 8-403.1 criteria must be met and maintained throughout the terms of the contract." (Page 8) In a Staff Report dated July 9, 2002, the Staff of the Commission's Energy Division alleges that the Pontiac facility no longer meets the requirements for determination that it is a QSWEF. These allegations are based on the belief that the facility is no longer using methane gas generated from landfills as its primary fuel. The Staff Report details the significant additions to generating capacity at the Pontiac facility and also the significant increase in electricity sales to Commonwealth Edison Company ("Edison"). As noted in the Staff Report, the additional generating capacity and the possible significant use of natural gas, rather than landfill-generated methane gas, to generate power could constitute a variance from the requirements of Section 8-403.1.

In addition, the Final Order requires RTC to file bi-annual reports regarding its energy producing facilities and annual reports regarding reimbursements providing information specified in the prefatory portion of the Final Order. See Finding 7 of the Final Order. The Staff Report indicates that RTC has not filed any of the required reports.

Section 10-101 of the Act provides in relevant part:

> The Commission, or any commissioner or hearing examiner designated by the Commission, shall have power to hold investigations, inquiries and

> hearings concerning any matters covered by the provisions of this Act. . . .

The Staff of the Energy Division has made a persuasive case in favor of investigating whether the Pontiac facility continues to meet the statutory requirements for a QSWEF. The Commission is inclined to exercise its authority under Section 10-101 of the Act to conduct such an investigation.

Section 10-108 of the Act also provides in relevant part:

> Complaint may be made by the Commission, of its own motion . . . setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission.

RTC received the determination concerning the facilities that were the subject of the Final Order on October 8, 1997. The Final Order records that the first of the subject facilities was to begin commercial operation during the 3rd quarter of 1997. This would trigger the filing of the reports required by the Final Order, so that reports are delinquent for calendar years 1998 through and including 2001. The failure of RTC to file the reports required by the Final Order as alleged in the Staff Report would constitute an omission that would be a violation of an order.

The Commission, being fully informed in the premises, is of the opinion and finds that:

(1) Resource Technology Corporation received a Commission determination that certain facilities were qualified solid waste energy facilities in Docket 97-0031 through 97-0045

consolidated, including the Pontiac facility (Docket 97-0034);

(2) Resource Technology Corporation should be made a respondent in this matter;

(3) the Commission has jurisdiction over the subject matter herein and the parties hereto;

(4) the recitals of fact set forth in the prefatory portion of this order are supported by the record and are hereby adopted as findings of fact;

(5) a proceeding should be initiated pursuant to Section 10-101 and Section 10-108 of the Public Utilities Act to determine whether the Pontiac facility owned and operated by respondent continues to meet the criteria of Section 8-403.1 of the Public Utilities Act mandated for a qualified solid waste energy facility and to determine whether Resource Technology Corporation has failed to file the bi-annual reports in 1998, 1999, 2000, and 2001 regarding its energy producing facilities and annual reports in 1998, 1999, 2000, and 2001 regarding reimbursements providing information specified in the prefatory portion of the Final Order as required by the Final Order;

(6) the Staff Report dated July 9, 2002 should be made a part of the record of this proceeding;

(7) the Commission should take administrative notice of the order entered in Dockets 97-0031 through 97-0045 consolidated on October 8, 1997.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that a proceeding be initiated under the authority of Section 10-101 and Section 10-108 of the Public Utilities Act to determine whether the Pontiac facility owned and operated by Resource Technology Corporation continues to meet the requirements for a qualified solid waste energy facility pursuant to Section 8-403.1 of the Public Utilities Act and to determine whether Resource Technology Corporation has failed to file the bi-annual regarding its energy producing facilities and annual reports regarding reimbursements in 1998, 1999, 2000, and 2001 as required by the Final Order.

IT IS FURTHER ORDERED that Resource Technology Corporation is made a respondent to this proceeding.

IT IS FURTHER ORDERED that the Staff Report dated July 9, 2002 is made part of the record of this proceeding.

IT IS FURTHER ORDERED that respondent appear before the Commission, at a time and date to be determined by the Administrative Law Judge assigned to this proceeding, to show cause, if any there be, why it should not have the determination that the Pontiac facility is a qualified solid waste energy facility revoked.

IT IS FURTHER ORDERED that respondent appear and offer evidence, if any there be, that it has complied with the report filing requirements delineated in Finding 7 of the Final Order in Dockets 97-0031 through 97-0045 consolidated.

IT IS FURTHER ORDERED that the failure of the respondent to appear may result in the entry of an order finding the allegations contained in the Staff Report dated

July 9, 2002 to be proven by a preponderance of the evidence, revoking the determination that the Pontiac facility is a qualified solid waste energy facility, and imposing civil penalties of not less than $500 nor more than $2000 for each offense of noncompliance with the report filing requirements of the Final Order, pursuant to Section 5-202 of the Public Utilities Act.

IT IS FURTHER ORDERED that this order is not final and that it is not subject to the Administrative Review Law.

By order of the Commission this 10th day of July, 2002.

(SIGNED) Richard L. Mathias
Chairman